(26,436)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 969.

WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

PETER BOEGLI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 21, 1918.

1 STATE OF INDIANA:

In the Supreme Court.

Be it remembered that heretofore to wit: on the 13th day of June, 1914, the same being the 18th Judicial day of the May Term, 1914, of said Supreme Court, the Western Union Telegraph Company by its attorneys, Barrett, Morris & Hoffman, George H. Fearons and Pickens, Moores, Davidson and Pickens, filed in the office of the Clerk of said Supreme Court of said State of Indiana a transcript of the record and proceedings had in the Allen Circuit Court of said State of Indiana in a cause wherein the Western Union Telegraph Company was appellant, and Peter Boegli was the appellee, together with an assignment of errors and in term bond by appellant.

2 Pleas in the Circuit Court of Allen County, Indiana, at a Regular Term Thereof Begun and Held at the Court-house, in the City of Fort Wayne, County of Allen, State of Indiana, Before the Honorable John W. Eggeman, Judge of the Thirty-eighth Judicial Circuit, Commencing on Monday, the 1st Day of September, A. D. 1913.

Present: W. E. Gerding, Clerk of said Court, and Amiel C. Gladieux, Sheriff of said County.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

First Paragraph of Complaint.

Be It Remembered, That heretofore, to-wit: On the 19th day of September A. D. 1913, said plaintiff filed in the office of the Clerk of the Allen Circuit Court of Allen County, Indiana, his complaint against the above named defendant, which complaint is in the words and figures following, to-wit:

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court, September Term, 1913.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Complaint for Damages and for Statutory Penalty.

Demand 200.00.

The plaintiff complains of the defendant, and says, that at the time of the grievances hereinafter set forth, the defendant was, and now is, an Electric Telegraph Company, duly organized as a Corporation, and engaged in the business of transmitting telegraphic messages for the public for hire in the State of Indiana, and at the time of said grievances had been, and was operating an office in the City of Chicago, Cook County, Illinois, and another in the City
3 of Fort Wayne, Allen County, Indiana, and owned and operated, at said time, a line of wires connecting said Cities; that on Wednesday, the 18th day of June, 1913, at or about four-thirty o'clock in the afternoon of said day, The Lafayette Mercantile Agency, of Chicago, Illinois, acting as the agent for this plaintiff, placed in the hands of defendant's agent, at defendant's office, in said city of Chicago, during the office hours of said defendant, in substance, the following message, to-wit:

"Chicago, Illinois, June 18th.

Arthur W. Parry, Shoaff Bldg., Atty. at Law, Fort Wayne, Indiana:

Have Boegli and other witness at our office eight A. M. Thursday.
LAFAYETTE MERCANTILE AGENCY."

That in consideration of the sum of twenty-seven (27) cents, to be paid on the delivery of said message, which said sum plaintiff paid to said defendant for the transmission of said message, defendant took and accepted said message, and undertook and agreed to transmit said message without delay, with impartiality, and in good faith, and in the order of time in which said message was received; that the amount received by the defendant, as aforesaid, was the full amount demanded by defendant for the transmission of said message; that the said Arthur W. Parry was also an attorney at law, employed by this plaintiff, and that said Lafayette Mercantile Agency was an agent employed by this plaintiff, and that said message was delivered to said defendant by said Lafayette Mercantile Agency, and addressed to said Arthur W. Parry, both as agents deliver said message to the addressee other than to attempt a delivery

of this plaintiff, and in the scope of, and relating to, the business in which said agents were employed, and acting for this plaintiff; that said Arthur W. Parry resided in the City of Fort Wayne,
4 Indiana, and about one mile from the office of defendant in said City.

Plaintiff further says that said defendant did not transmit said message with impartiality, without delay, and in the order of time in which said message was received, but, on the contrary carelessly and negligently delayed the transmission and delivery of said message out of the order of time in which said message was received; that the message was received by the defendant's agents in their office in the City of Fort Wayne, Indiana, at or about five o'clock on the day on which it was delivered to defendant, and during the office hours of said defendant; that nevertheless, said defendant held said message in their said office, in the City of Fort Wayne, Indiana, and negligently and carelessly delayed the delivery thereof, until eight-thirty o'clock A. M. on the following day; whereby defendant became indebted to plaintiff in the sum of one Hundred ($100.00) Dollars, the same being the statutory penalty in such cases made and provided. That no part of said sum has been paid, but that the total amount thereof, to-wit, One Hundred ($100.00) Dollars is now due and unpaid.

Wherefore, plaintiff demands judgment against said defendant in the sum of One Hundred ($100.00) Dollars, and for all other proper relief.

Second Paragraph of Complaint.

2. And for a second and further paragraph of complaint, plaintiff complains of defendant, and says, that said defendant is a corporation duly organized and incorporated, and at the time of the grievances hereinafter set forth, was, and still is, engaged in doing general telegraphic business, and for that purpose, has lines of wires wholly within the said State of Indiana, and also lines of wires which are partly in said State, and partly in the State of Illinois; that during all of said time said defendant, as such Telegraphic Company,
5 has kept and maintained *has kept and maintained* an office at the City of Chicago, in the State of Illinois, for the purpose of receiving dispatches to be sent over its lines of wires, and for the purpose of receiving its dispatches to be delivered by it at said City, to any or all persons to whom said dispatches are addressed; and that during all of said time, said defendant has been engaged in the business of transmitting telegraphic messages to the public, for hire; that on the dates hereinafter set forth, said defendant was the owner and operator of a line of wires from the said City of Chicago to the City of Fort Wayne, in the County of Allen, and State of Indiana, at which City, said defendant, during all of said time, kept and maintained an office for the purpose of receiving and sending, and receiving and delivering telegraphic messages for the public.

Plaintiff further says, that on Wednesday the 18th day of June, 1913, one Lafayette Mercantile Agency, of Chicago, Illinois, de-

livered to said defendant at its office in the City of Chicago, during its regular office hours, to be transmitted, and delivered, in the City of Fort Wayne, Indiana, to one Arthur W. Parry, the following telegraphic dispatch, to-wit:

"Chicago, Illinois, June 18th.

Arthur W. Parry, Shoaff Bldg., Atty. at Law, Fort Wayne, Indiana:

Have Boegli and other witness at our office eight A. M. Thursday.

LAFAYETTE MERCANTILE AGENCY."

That the agent of said defendant received said message, and in consideration of the sum of twenty-seven cents, to be paid for after delivery, then and there promised and agreed to transmit said dispatch immediately, and to cause the same to be delivered, without delay; that said defendant thereupon undertook to transmit
6 and deliver said dispatch to said Arthur W. Parry, in said City of Fort Wayne, Indiana, without delay, and with promptness and dispatch.

Plaintiff further avers, that at the time of the mailing of said dispatch, he then had a suit pending in the Municipal Court, in the City of Chicago, which cause was then awaiting its turn for trial on the dockets of said Court; that he had employed and retained said Lafayette Mercantile Agency, in the City of Chicago, and said Arthur W. Parry, in the City of Fort Wayne, Indiana, as his attorneys at Law, for him to prosecute and try said case; that the residence of this plaintiff is in the City of Fort Wayne, Indiana, and that he had theretofore instructed his said attorneys, in Chicago, to notify him by telegram, as soon as said case should be set for trial, in order that this plaintiff and his said attorney, and his witnesses, might journey from the City of Fort Wayne, to the City of Chicago, in time to be there for the hearing of said trial.

That said dispatch, above referred to, was delivered by said attorney in Chicago to defendant, in accordance with said instructions, said case having been set for trial for the following morning, to-wit, Thursday June 19, and said dispatch was intended to notify this plaintiff that said suit was set for said morning, and that it would be necessary for him to make said trip to Chicago and to be there in the office of his said Chicago attorney, by eight o'clock on Thursday morning as aforesaid, in order that they might appear at, and prosecute said trial.

Plaintiff further says, that said dispatch was delivered to the defendant in the City of Chicago, at about four-thirty o'clock of the afternoon of Wednesday, June 18, 1913, and was transmitted to, and received at its office in said City of Fort Wayne, Indiana, at or about, five o'clock P. M. on said afternoon. That had said
6½ dispatch been delivered promptly upon receipt thereof, at said Fort Wayne office, plaintiff would have had ample oppor-

tunity to be with his attorney and witnesses in the City of Chicago at 8 A. M. on the following morning to attend at and prosecute said trial. That there is direct rail communication between said cities of Fort Wayne and Chicago; that on said 18th day of June, 1913, there was a regular passenger train which left the said city of Fort Wayne at 8:45 o'clock P. M. which reached the said city of Chicago, Ill. at 1:5 A. M. o'clock of the following day; that there was another regular passenger train which left said city of Fort Wayne at 2:20 o'clock A. M. on Thursday morning June 19th, 1913, which arrived in said city of Chicago, Ills., at about 7:00 o'clock A. M. of the same day. That the fare on either of said trains, from the said City of Fort Wayne, Ind., to said city of Chicago, Ills., by buying a ticket to the last city of Indiana on said line and paying cash from there in to Chicago, as is customary with passengers on said line, is $3.02.

Plaintiff further says that said defendant wholly failed and neglected to transmit and deliver said dispatch promptly, and wholly failed and neglected to deliver said dispatch within a reasonable time, but carelessly and negligently failed and neglected to deliver said telegram until the hour of 8:30 o'clock A. M. of the following day, to-wit, Thursday, June 19th, 1913; that, at the time said dispatch was so delievered to said defendant at said city of Chicago, and at all times thereafter, and for fifteen years prior thereto, said Arthur W. Parry had resided in said City of Fort Wayne and was well known in said City; that during all of said time, he had resided within about a mile, and for a number of years had conducted a law office in the Shoaff Building in said city within a block, of the office of defendant in said city;

7 that said Parry had a telephone both at his said office and at his said residence; that in the city directory, which contained the names of the citizens living in said city of Fort Wayne, said Parry's name was printed in large black type, together with the address of his said office and residence, and the telephone number, both of the phone at his office and at his house. Plaintiff further avers, that upon receipt by said Parry of said message he at once communicated with said attorney in Chicago, by telephone, advising him of the said negligent delay in delivery of said telegram and that he and this plaintiff would go to Chicago on the next train leaving for that City, and instructed said Chicago attorney to endeavor to secure a postponement of said case, until such time in the afternoon as they could arrive there. That said telephone message cost Ninety Cents.

That the next passenger train leaving Fort Wayne, left at ten-ten A. M. of said morning, and that said plaintiff and his said attorney took said train for Chicago, arriving there about two P. M. in the afternoon of said day. That said train was an extra fare train, the fare being Four Dollars and Fifty Cents ($4.50).

That plaintiff's Chicago attorney held said trial off as long as possible on said 19th day of June, 1913, and being unable to secure a trial thereof in the afternoon, and plaintiff not having arrived he was compelled to secure a postponement of said trial until the following morning, when said trial was held and disposed of. That had

said plaintiff been in Chicago at the hour stated in said dispatch, said trial would have been heard on said Thursday morning and disposed of, and plaintiff would have returned on the afternoon or evening of said day, but that by reason of said postponement, it became necessary for this plaintiff and his said attorney to wait over
8 until the following day, and to spend the day of Friday also in Chicago, at a loss to this plaintiff by way of additional hotel bills, loss of time, and additional attorney's fees of forty-one Dollars and fifty Cents ($41.50).

Plaintiff further avers that said Lafayette Mercantile Agency, in delivering said message to defendant for transmission, and said Arthur W. Parry in receiving said message, were both acting for and on behalf of, this plaintiff, and were within the scope of their agency for him.

Plaintiff further avers that by reason of defendant's negligence as aforesaid, and by reason of the defendant's failure to discharge its duties in the premises as imposed upon it by the statutes of the State of Indiana in such cases made and provided, this plaintiff has been damaged in the sum of Forty-one Dollars and fifty cents ($41.50) which said sum is now justly due and owing from said defendant to this plaintiff, in accordance with the statutes of the State of Indiana.

Wherefore, plaintiff demands judgment against defendant in the sum of Two Hundred ($200.00) Dollars, and for all further and proper relief.

ARTHUR W. PARRY,
Attorney for Plaintiff.

And afterwards, on the 6th day of October A. D. 1913, the same being the 31st juridical day of the September Term, 1913, of said Court, the following further proceedings were had by said Court in said Cause, to-wit:

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

9 *Motion to Separate and Docket Separately Causes of Action Overruled and* and *Exception by Defendant.*

Come now the parties, and the defendant files motion to have plaintiff separate his cause of action and separately docket the same, which motion is in these words:

STATE OF INDIANA,
Allen County:

In Allen Circuit Court.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

The defendant moves the Court to require the plaintiff to separate and have docketed as separate actions the first and second paragraphs, because the first paragraph of complaint seeks to recover on tort and the second paragraph seeks to recover on contract.

BARRETT & MORRIS,
Attys. for Deft.

and which motion is by the Court overruled, to which ruling of the Court the defendant excepts, and said defendant is granted ten days in which to file his bill of exceptions, and said defendant now files separate demurrer to 1st paragraph of plaintiff's complaint, in these words:

Separate Demurrer of Defendant to 1st Paragraph of Complaint.

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Comes now the Western Union Telegraph Company, defendant herein, and separately demurs to the first paragraph of complaint because said first paragraph of complaint does not state facts sufficient to constitute a cause of action in this:

1st. Because it affirmatively appears by averment in said first paragraph of complaint that plaintiff was not the sender and did not sign the message or telegram described in said paragraph of complaint for which reason plaintiff has no right of action to recover the penalty prayed in said first paragraph of complaint.

2nd. Because it is affirmatively averred in said first paragraph of complaint that the telegram or message set out in said paragraph was delivered to the office of this defendant at Chicago, Illinois, to be transmitted over its lines to Fort Wayne, Indiana, to be delivered at a point and was interstate commerce business and under such facts

plaintiff would not be entitled to recover the statutory penalties sought to be recovered on said first paragraph because the Legislature of the State of Indiana under the facts averred would have no power to regulate commerce between the State of Illinois and State of Indiana or to impose a penalty on the facts alleged in said first paragraph of complaint.

3rd. Because it is not alleged in said first paragraph of complaint that defendant had any knowledge of or knew that either the Lafayette Mercantile Agency or Arthur W. Parry, named in said first paragraph, were the agents of or acting as attorneys for plaintiff.

4th. Because it is not alleged in said first paragraph of complaint, that plaintiff prepaid for the transmission and delivery of the message set out in said first paragraph of complaint.

BARRETT & MORRIS,
Attys. for Deft.

and also files separate demurrer to 2nd paragraph of plaintiff's complaint in these words:

11 *Defendant's Separate Demurrer to Second Paragraph of Complaint.*

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

The defendant demurs separately to the second paragraph of complaint because the same does not state facts sufficient to constitute a cause of action in this:

1st. Because plaintiff in said second paragraph of complaint does not aver or set up any contractual relations between plaintiff and defendant as to the subject matter of said paragraph of complaint.

2nd. Because in said second paragraph of complaint no contract between this defendant and plaintiff is alleged for the breach of which plaintiff would be entitled to damages sought to be recovered on said second paragraph of complaint.

3rd. Because it is not alleged in said second paragraph of complaint that defendant had any notice of outlays and expenses of plaintiff made or contemplated as alleged in said paragraph of complaint.

4th. Because on the allegation in said second paragraph of complaint this defendant would only be liable, if at all, for damages to the Lafayette Mercantile Agency, the sender and signer of the telegram set out in said second paragraph of complaint.

5th. Because it is not alleged in said second paragraph of complaint that defendant had any knowledge of or knew that either the Lafayette Mercantile Agency or Arthur W. Parry, named in said first paragraph, were the agents of or acting as attorneys for plaintiff.

BARRETT & MORRIS,
Attorneys for Defendant.

12 *Defendant's Separate Demurrer to 1st and 2nd Paragraph- of Complaint Overruled and Separate Exception by Defendant.*

And afterwards, On the 10th day of October A. D. 1913, the same being the 35th juridical day of the September Term, 1913, of said Court, the following further proceedings were had by said Court in said Cause, to-wit:

PETER BOEGLI
vs.
THE WESTERN UNION TELEGRAPH COMPANY.

Come now the parties, and defendant's demurrer to 1st paragraph of plaintiff's complaint is by the Court overruled, to which ruling of the Court said defendant excepts, and the defendant's separate demurrer to plaintiff's second paragraph of complaint is by the Court overruled, to which ruling of the Court said defendant excepts.

And afterwards, on the 13th day of October A. D. 1913, the same being the 37th juridical day of the September Term, 1913, of said Court, the following further proceedings were had by said Court in said Cause, to-wit:

PETER BOEGLI
vs.
THE WESTERN UNION TELEGRAPH COMPANY.

Comes now the defendant, and presents to the Court its bill of exceptions number one, in these words:

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court.

PETER BOEGLI
vs.
THE WESTERN UNION TELEGRAPH COMPANY.

13 *Bill of Exceptions Embracing Motion and Ruling to Separate and Docket Separately Causes of Action.*

Be it remembered, That on the 6th day of October, 1913, being the 31st Juridical day of the September Term, 1913, of the Allen

Circuit Court the Western Union Telegraph Company, defendant in the above cause, filed its written motion to require plaintiff to separate the different causes of action stated in the first and second paragraphs and to have the same docketed as separate actions, which motion is in these words:

STATE OF INDIANA,
Allen County:

In Allen Circuit Court.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

The defendant moves the Court to require the plaintiff to separate and have docketed as separate actions, the first and second paragraphs, because the first paragraph of complaint seeks to recover on tort and the second paragraph seeks to recover on contract.

BARRETT & MORRIS,
Attys. for Deft.

and on said day said Court overruled said motion, to which ruling defendant at the time excepted and asked and was granted ten days in which to file its bill of acceptance embracing said motion and ruling thereon and exception thereto.

And now on this 13th day of October, 1913, being the 37th Juridical day of said Term of said Court and within the time allowed therefor defendant presents it bill of exceptions and prays that the same may be signed, filed and made part of the record which is accordingly done this 13th day of October, 1913.

J. W. EGGEMAN, *Judge.*

14 which bill is signed by the Judge, now filed and the same is ordered made a part of the record in this cause.

And afterwards, On the 18th day of October A. D. 1913, the same being the 42nd juridical day of the September Term, 1913 of said Court, the following further proceedings were had by said Court in said Cause, to-wit:

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Comes now the defendant, and files answer of general denial in these words: (Answer of general denial appears in this transcript with the second paragraph of answer to the first paragraph of complaint, hereinafter set out.)

15 also files second and third paragraphs of answer to first paragraph of complaint, in these words:

Defendant's Answer of General Denial to Both Paragraphs of Complaint and Second Paragraph of Answer to First Paragraph of Complaint.

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court.

No. 12921.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

The defendant for answer to the first and second paragraphs of complaint herein deny each and every material allegation in said paragraphs of complaint.

And for a second paragraph of answer to the first paragraph of complaint this defendant says that it received the telegraph message set out in said first paragraph on the 18th day of June, 1913, about five o'clock P. M. of said date, and immediately thereafter this defendant without delay, with impartiality, in good faith and in the order in which said message was received took said message for delivery to the office of A. W. Parry, Attorney-at-law, Shoaff Bldg., Fort Wayne, Indiana, for delivery, but was unable to deliver the same because the office of said Arthur W. Parry, in said Shoaff Bldg., was closed; that without delay, with impartiality and in order time thereafter at 7:50 P. M. June 19th, 1913 said message was delivered to said Arthur W. Parry at his office, which was the earliest and first opportunity defendant had to deliver the same.

Wherefore as to said paragraph of complaint defendant demands judgment.

Defendant's Third Paragraph of Answer to First Paragraph of Complaint.

And for a third paragraph of answer to the first paragraph of complaint defendant says that the message set out in said paragraph of complaint was an interstate message to be sent from a point
16 in the State of Illinois to a point in the State of Indiana and was as such interstate commerce; that by the Act of Congress approved June 18, 1910, the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph and thereby removed and exempted said interstate communication by telegraph from the field of state regulation or interference and undertook to and did confer upon the Interstate

Commerce Commission full power over all rates, charges, facilities, classifications, penalties and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce and in particular conferred the placing and imposing of all penalties against such telegraph companies upon said Interstate Commerce Commission and it has ever since retained and still retains such charge and by reason thereof the Legislature of the State of Indiana had no power to inflict on this defendant the penalty which is sought to be recovered in said first paragraph under the statute of Indiana, as the Legislature of said State of Indiana would have no power to regulate commerce between states and impose a penalty as sought to be recovered in said first paragraph of complaint; that said act of congress nullified and rendered void the statute of Indiana on which plaintiff seeks to recover the penalty prayed for in said paragraph of complaint.

Wherefore defendant demands judgment on said first paragraph of complaint.

BARRETT & MORRIS,
Attorneys for Defendant.

also files second paragraph of answer to second paragraph of plaintiff's complaint, in these words:

17 *Defendant's Second Paragraph of Answer to Plaintiff's Second Paragraph of Complaint.*

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court.

No. 12921.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

And for a second paragraph of answer to the second paragraph of complaint this defendant says that it received the telegraph message set out in said first paragraph on the 18th day of June, 1913, about five o'clock P. M. of said date, and immediately thereafter this defendant without delay, with impartiality, in good faith and in the order of time in which said message was received took said message for delivery to the office of A. W. Parry, Attorney-at-law, Shoaff Bldg., Fort Wayne, Indiana, for delivery, but was unable to deliver the same because the office of said Arthur W. Parry, in said Shoaff Bldg., was closed; that without delay, with impartiality and in order of time thereafter at 7:50 P. M. June 19th, 1913, said message was delivered to said Arthur W. Parry at his office, which was the earliest and first opportunity defendant had to deliver the same.

Wherefore as to said paragraph of complaint defendant demands judgment.

BARRET & MORRIS,
Attorneys for Defendant.

And afterwards, On the 28th day of November A. D. 1913, the same being the 10th juridical day of the November Term, 1913 of said Court, the following further proceedings were had by said Court in said Cause, to-wit:

18

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Comes now said plaintiff, and files motion to strike out 3rd paragraph of defendant's answer to 1st paragraph of complaint, which motion is in these words:

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court, September Term, 1913.

No. 12921.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Motion to Strike Out the 3rd Paragraph of Defendant's Answer to Plaintiff's 1st Paragraph of Complaint.

Comes now the plaintiff and moves to strike from the files the 3rd paragraph of defendant's answer to plaintiff's 1st paragraph of complaint for the following reasons to-wit:

That the same states no new fact that is not already apparent on the face of the complaint; that the Act of Congress referred to is judicially known to this Court, and does not need to be pleaded; and that therefore the question as to the constitutionality of the said Act of the State of Indiana could and should have been raised by demurrer, and the said paragraph of answer is therefore improper, immaterial and surplusage.

Wherefore plaintiff moves the Court to strike said paragraph of answer from the files, and for all other and further relief.

ARTHUR W. PARRY,
Attorney for Plaintiff.

19 *Motion Overruled and Exception.*

and which motion is by the Court overruled, to which ruling of the Court said plaintiff excepts. And said plaintiff now files motion to strike out parts of 3rd paragraph of defendant's answer to 1st paragraph of complaint, in these words:

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court, September Term, 1913.

No. 12921.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Motion to Strike Out Parts of the 3d Paragraph of Defendant's Answer to the 1st Paragraph of Complaint.

Comes now the plaintiff and moves the Court to strike out of the defendant's 3rd paragraph of answer to the 1st paragraph of complaint the following parts and each of them, separately and severally, as follows to-wit:

1. That part of said paragraph commencing with the words "That by the" on the last line of the 1st page, and ending with the words "State regulation of interference" on the 5th line of the 2nd page thereof, for the reason that the same does not state any fact, but is merely a conclusion on the part of the pleader, and for the further reason that the provisions of the Act referred to are judicially known to this Court, and the same is therefore surplusage.

2. That part of said paragraph beginning with the words "and undertook to" in the 6th line of said paragraph on the 2nd page down to and including the words "still retains such charge" in the 13th line of the 2nd page, for the reason that the provisions of the Acts of Congress and the Statutes of the United States are judicially known to this Court, and that said allegations are therefore surplusages and irrelevant, and for the further reason that said por-
20 tion is merely the conclusion of the defendant, and not the statement of any fact.

3. Also that portion of said paragraph beginning with the words "By reason thereof" in line 13 of the second page, and ending with the words "Statute of Indiana" in the 16th line of the 2nd page;

Also the part beginning with the words "as the Legislature" on line 16 of the 2nd page, and ending with the words "paragraph of complaint" in the 19th line of said paragraph, and also the part beginning with the words "That said Act" in the 19th line of the 2nd

page, and ending with the words "Paragraph of complaint" in 22nd line of said paragraph;

And each of said parts, separately, and severally, for the reason that said portions do not contain the statement of any fact, but are each of them merely the conclusions of the pleader as to the effect of the provisions of the Act of Congress which are already judicially known to this Court.

Wherefore plaintiff moves the Court to strike from said paragraph of answer each and every one of the above portions thereof, separately and severally, for the reasons stated herein.

ARTHUR W. PARRY,
Attorney for Plaintiff.

Motion Overruled and Exception by Plaintiff.

which motion is by the Court overruled, to which ruling of the Court plaintiff excepts. And said plaintiff files separate and several demurrers to 2nd and 3rd paragraphs of answer to 1st paragraph of complaint, in these words:

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court, September Term, 1913.

No. 12921.

21 PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Demurrer to Defendant's 2nd Paragraph, Answer to the 2nd Paragraph of Complaint, and to the 2nd and 3rd Paragraphs of Answer to the 1st Paragraph of Complaint.

Comes now the plaintiff and demurs, separately and severally, to the second and third paragraphs of the defendant's answer to plaintiff's first paragraph of complaint, and to the second paragraph of defendant's answer to the second paragraph of complaint, and to each of them separately and severally, and for grounds of demurrer says:

That neither of said paragraphs states facts sufficient to constitute a cause of defence to the paragraph of complaint to which it is addressed, and to the cause of action stated therein, for the following reasons to-wit:

(*a*) That said second paragraph of answer to the first paragraph of complaint and said second paragraph of answer to the second paragraph of complaint, each

1st. Fails to state facts showing that the defendant made any effort to ascertain the whereabouts of the addressee of said message or to

at the place to which the message was addressed, or showing that by a reasonable amount of diligence defendant could have ascertained the whereabouts of and promptly delivered said message to the addressee thereof.

2. That it fails to deny the allegations of the complaint, and therefore admits, that by examining the City Directory defendant could have learned of addressee's address at his residence, and also *og* the number of the telephone at his residence, and that by calling up his residence over the phone, or by inquiring at his residence, the defendant could have learned of addressee's whereabouts, and
22 could then have delivered said message to the addressee within a prompt and reasonable time; and in the order of time in which it was received.

3rd. That said paragraphs do not state *facts* any facts tending to show that the defendant could not have delivered said message to the addressee thereof within a prompt and reasonable time without delay, and in the order of time in which said message was received, by the exercise of a reasonable amount of diligence in ascertaining the whereabouts of the addressee upon learning that he was not at his office.

(*b*) That said third paragraph of answer to the first paragraph of complaint

1. Does not state any fact that is not already admitted in the complaint or judicially known to the Court, and that could not have been called to the Court's attention by a demurrer, and that if plaintiff's complaint is good under the Act of Congress as judicially known to the Court when the sufficiency of said paragraph of complaint under the law was passed on by the Court, the further pleading of that law cannot constitute a defense, but is immaterial, irrelevant and surplusage.

2. That said paragraph does not allege any fact tending to show that the statute of Indiana on which plaintiff bases his first paragraph of complaint is an unreasonable or absurd regulation of interstate commerce, or affects it in any but a purely incidental manner in the valid exercise of the police power of the State of Indiana, or that said statute of Indiana conflicts with said Act of Congress referred to, or that its provisions cannot be carried out together with those of the Act of Congress referred to without necessarily conflicting or being inconsistent with each other.

3. That said paragraph of answer does not correctly allege the provisions of the Act of Congress referred to.

4. And for the further reason that the Statute of Indiana
23 is a valid exercise of the police power of the State of Indiana, that it is a reasonable provision looking toward the protection of the people of the State, and that it only affects interstate commerce in an incidental manner, that it does not conflict with the Act of Congress referred to in the paragraph of answer in question, but that it is consistent with said Act, and that both can be carried out without interference with each other.

ARTHUR W. PARRY.
Attorney for Plaintiff.

also files separate and several demur-s to 2nd paragraph of defendant's answer to second paragraph of plaintiff's complaint, in these words: (Set out in the foregoing demurrer to 2nd and 3rd paragraphs of answer to 1st paragraph of complaint.)

And afterwards, on the 29th day of November, A. D. 1913, the same being the 11th juridical day of the November Term, 1913, of said Court, the following further proceedings were had by said Court in said Cause, to-wit:

PETER BOEGLI

VS.

THE WESTERN UNION TELEGRAPH COMPANY.

Plaintiff's Separate Demurrer to 2nd and 3rd Paragraphs of Answer to First Paragraph of Complaint and to Second Paragraph of Answer to Second Paragraph of Complaint Sustained and Separate Exception by Defendant.

Come now the parties, and plaintiff's separate and several demurrers to second and third paragraphs of defendant's answer to first paragraph of complaint are by the Court sustained, to which ruling of the Court the defendant separately and severally excepts. And plaintiff's separate and several demurrers to second paragraph of defendant's answer to second paragraph of complaint *is* by the Court sustained, to which ruling of the Court the defendant separately and severally excepts.

24 And afterwards, On the 20th day of March A. D. 1914, the same being the 41st juridical day of the February Term, 1914 of said Court, the following further proceedings were had by said Court in said Cause, to-wit:

PETER BOEGLI

VS.

THE WESTERN UNION TELEGRAPH COMPANY.

Second Paragraph of Complaint Withdrawn by Plaintiff.

Come now the parties, and with permission of Court plaintiff now withdraws his second paragraph of complaint. And the defendant now files written request that the Court state findings of fact and conclusions of law in writing, which request is in these words:

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Request for Court to Find Facts Specially and to State Conclusions of Law.

Comes now the Western Union Telegraph Company, defendant herein, and requests the Court to find the facts in this action sepcially and to state its conclusions of law thereon in writing.

BARRETT, MORRIS & HOFFMAN,
Attorneys for Defendant.

And this cause is now submitted to the Court for trial, and the evidence in this cause being heard, said cause is continued.

And afterwards, On the 11th day of April A. D. 1914, the same being the 60th juridical day of the February Term, 1914 of said Court, the following further proceedings were had by said Court in said Cause, to-wit:

25 PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Come now the parties herein, and the Court as heretofore requested by the defendant, now files its special findings of facts and conclusions of law thereon, in the following words and figures; to-wit:

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court, February Term, 1914.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Special Findings of Facts.

The court, at the request of the defendant in the above entitled cause, hereby makes and files its special findings of facts in writing and states its conclusions of law thereon as follows:

1. That on the Eighteenth (18th) day of June, 1913, for many years prior thereto and ever since, the defendant, Western Union Telegraph Company was, and now is, an Electric Telegraph Company, duly organized as a corporation, and engaged in the business of transmitting telegraphic messages for the public for hire in the States of Indiana and Illinois, and between said States, and was on said Eighteenth (18th) day of June, 1913, operating an office in the City of Chicago, Illinois, and another in the City of Fort Wayne, Indiana, and was owning and operating a line of wires connecting said cities.

2. That on Wednesday, the Eighteenth (18th) day of June, 1913, at about 4:30 o'clock in the afternoon, The La Fayette Mercantile Agency of Chicago, Illinois, placed a message in the hands
26 of defendant's agent at defendant's office, in said city of Chicago, during the office hours of said defendant to be transmitted to one Arthur W. Parry of Fort Wayne, Indiana; said message being in substance as follows, to-wit:

"Form —.

The Western Union Telegraph Company, Incorporated.

25,000 offices in America. Cable Service to all the world.
Theo. N. Vail, President.
Belvidere Brooks, General Manager.

Receiver's No.	Time Filed.	Check.
B. T. 40.	4.23 P. —.	12 collect

Send the following message subject to the terms on back hereof, which are agreed to.

Chicago, Ill., June 18th, 1913.

To Arthur W. Parry, Atty. at Law, Shoaff Bldg., Fort Wayne, Ind.:

B. T. Chicago, June 18, 1913.

Have Boegli and other witness at our office eight A. M. Thursday.
27 LA FAYETTE MERCANTILE AGENCY.

Booked.
Chicago Copy.
J. B.

Collect. A158FA. 504. P M S 3 0 M.

On reverse side:
All messages taken by this Company are subject to the following terms which are hereby agreed to.

To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraph- back to the
27 originating office for comparison. For this, one-half the repeated message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated message and paid for as such, in consideration whereof it is agreed between the sender of the message and this Company as follows:

1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless especially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages.

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for non-delivery of this message, whether caused by negligence of its servants or otherwise, beyond the sum of Fifty Dollars, at which amount this message is hereby valued, unless a greater value is stated in writing hereon at the time the message is offered to the Company for transmission, and an additional sum to one-tenth of one per cent thereof.

3. The company is hereby made the agent of the sender, without liability to forward this message over the lines of any other Company when necessary to reach its destination.

4. Messages will be delivered free within one-half mile of the Company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reason-
28 able price.

5. No responsibility attaches to this Company concerning messages until the same are accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in any case unless the claim in writing is presented to the Company within 60 days after the message is filed with the Company for transmission.

7. No employee of the Company is authorized to vary the foregoing.

BELVIDERE BROOKS,
General Manager.

THEO. N. VAIL, *President.*

Money transferred by telegraph and cable to all the world.

The Western Union Telegraph Co. is the largest telegraph system existing. Over one and a quarter million of wire and cable it ac-

cepts messages for all telegraph stations in the world, subject to the terms herein.

The two telegraph poles represent the relative size in number of offices of the Western Union as compared with the offices of all other competing companies combined.

Western Union	All
Telegraph	Competing
Company	Companies."

3. That, in consideration of the sum of Twenty-seven cents (27¢), to be paid on the delivery of said message, which sum was paid by the plaintiff after the delivery of said message, the defendant undertook and agreed to transmit and deliver said message to said Arthur W. Parry at Fort Wayne, Indiana.

4. That the amount asked, and paid for said message were the usual terms upon which Company accepted, transmitted and
29 delivered messages.

5. That said defendant thereupon transmitted said message to its office in said city of Fort Wayne, Indiana, the said message was received at said Fort Wayne Office at 5:20 P. M. on said Eighteenth (18th) day of June, 1913, and during the office hours of said defendant. That said office at Fort Wayne, Indiana, remains open for the receipt and delivery of messages during the whole of the day and night. That upon receipt of said message, at 5:20 o'clock P. M., June 18, 1913, the defendant endeavored to deliver the same to said Arthur W. Parry at his office in the Shoaff Building, Fort Wayne, Indiana, which is located about one (1) block from the office of the defendant in said City, but did not find said Arthur W. Parry in his said office and thereupon said defendant returned the said message to its office in said City of Fort Wayne and held the same there until about 8:30 o'clock A. M. on the following day, namely, June Nineteenth (19th), 1913, at which time it delivered the said message to said Arthur W. Parry at his office in the Shoaff Building, Forty Wayne, Indiana.

6. That said addressee in said message, namely, Arthur W. Parry, lived in said city of Fort Wayne, at 1319 West Washington Street, about one (1) mile from the office of the defendant in said City. That he was at his said residence from the time of the receipt of the said message at defendant's Fort Wayne Office until the following morning. That said message could have been delivered to said addressee had a messenger been sent to his said residence.

7. That said Arthur W. Parry's name appeared in large black type in the City Directory in current use by the business men and citizens of Fort Wayne, Indiana, at that time together with the address of his office and house and the number of the telephone which he had both at his office and at his house.

30 8. That the defendant with the exercise of a reasonable and ordinary amount of diligence could have effected delivery

of said telegram to said Arthur W. Parry during the evening of said Eighteenth (18th) day of June, 1913.

9. That the defendant received at its Fort Wayne office after 5:20 P. M. and delivered during the said evening of June Eighteenth (18th), 1913, a large number of telegrams.

10. That the defendant negligently and carelessly delayed the delivery of said message out of the order of time in which said message was received.

11. That at the times mentioned therein the said LaFayette Mercantile Agency of Chicago, Illinois, and the said Arthur W. Parry at Fort Wayne, Indiana, were attorneys at law in the employ of said Peter Boegli and that the said sender of said message sent said message as the agent of plaintiff and on his behalf and sent it to the sendee as the agent of, and for, the plaintiff. That said attorneys were then representing plaintiff herein in certain litigation then pending in the Municipal Court of Chicago, Illinois, and that said message related to said litigation and was delivered to the defendant for transmission to the sendee in the scope of and relating to the said business in which said attorneys were employed.

12. That said message was intended to inform the plaintiff that his said litigation would come on for trial on the morning of June Nineteenth (19th), 1913, and that he should have his witnesses in said City at that time. That he would have been able to arrive in said City with his witnesses at the time stated in said message had said message been delivered on the evening of said Eighteenth (18th) day of June, 1913. That the journey from Fort Wayne to Chicago by railroad requires about four (4) hours. That by reason of said delay the plaintiff was damaged.

31 13. That the face of said message was sufficient to appraise the defendant and its agents of the necessity for a prompt delivery of said message, and that the plaintiff would be damaged unless said message was promptly delivered.

The court now states its conclusions of law on the facts found as follows, to-wit:

Conclusions of Law.

1. That it was the duty of the defendant on not finding the addressee of said message at the address given in the message, to use ordinary and reasonable diligence to ascertain his whereabouts in said City of Fort Wayne, and to effect delivery of said message, and that its failure to do so was a violation of its duty to plaintiff under the laws of the State of Indiana.

2. That the fact that defendant negligently and carelessly delayed the delivery of said message out of the order of time in which it was received, was a violation of its duty under the provisions of the statutes of Indiana in such cases made and provided.

3. That the defendant is liable to the plaintiff for the statutory penalty in such cases made and provided, to-wit: One Hundred

($100.00) Dollars, and that said sum is now due and owing from defendant to plaintiff.

J. W. EGGEMAN,
Judge of the Allen Circuit Court.

Separate Exceptions by Defendant to Each Conclusion of Law.

April 11, 1914. And the defendant, Western Union Telegraph Company, separately excepts to each of the foregoing conclusions of law, stated by the Court, at the time and on the date of signing and filing the same.

BARRETT, MORRIS & HOFFMAN,
Attys. for Deft.

To each of which conclusions of law the defendant separately excepts.

32 And afterwards, on the 20th day of April A. D. 1914, the same being the 1st juridical day of the April Term, 1914, of said Court, the following further proceedings were had by said Court in said Cause, to-wit:

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Defendant's Motion for a New Trial.

Comes now said defendant and files motion for a new trial of this cause, with written reasons, which motion is in these words:

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court.

PETER BOEGLI

vs.

WESTERN UNION TELEGRAPH COMPANY.

Comes now the Western Union Telegraph Company, defendant in the above action, and moves the Court for a new trial herein for the following reasons:

1st. The decision of the court in this cause is not sustained by sufficient evidence.

2nd. The decision of the court in this case is contrary to law.

3rd. Because the damages assessed in this cause are excessive.

BARRETT, MORRIS & HOFFMAN,
Attorneys for Defendant.

And afterwards, on the 5th day of May A. D. 1914, the same being the 14th juridical day of the April Term, 1914, of said Court, the following further proceedings were had by said Court in said cause, to-wit:

33

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Motion for New Trial Overruled, Exception and Time Granted to File Bill of Exceptions.

Come now the parties herein, and the motion by the defendant for a new trial of this cause, is by the Court overruled, to which ruling of the Court the defendant excepts, and sixty days' time is given the defendant to file its bill of exceptions. And the Court now renders judgment, on its special findings of fact and conclusions of law thereon, as follows:

Judgment and Appeal to Supreme Court Granted.

It is therefore considered, adjudged and decreed by the Court, that said plaintiff do have and recover of and from the defendant herein the sum of one hundred dollars, the statutory penalty which sum is now due and owing from defendant to plaintiff, besides his costs herein laid out and expended, to which judgment and rendition thereof the defendant excepts, and sixty days' time is granted the defendant to file all bills of exceptions.

And said defendant now prays an appeal to The Supreme Court, which appeal is by the Court granted, upon defendant filing bond in the sum of Two Hundred and Fifty Dollars, with Charles E. Bond as surety, within fifteen days from date hereof, which surety is by the Court approved.

And afterwards, on the 6th day of May A. D. 1914, the same being the 15th juridical day of the April Term, 1914, of said Court, the following further proceedings were had by said Court in said Cause, to-wit:

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

34

Appeal Bond Filed.

Comes now the defendant herein and files its appeal bond, with Charles E. Bond as surety, as heretofore ordered by the Court, which bond and surety is now by the Court approved, and is in these words:

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court.

PETER BOEGLI
vs.
WESTERN UNION TELEGRAPH COMPANY.

We, The Western Union Telegraph Company, defendant in the above action, principal, and Charles E. Bond, surety, are held and firmly bound to Peter Boegli, the plaintiff in the above action, in the sum of two hundred fifty dollars ($250.00) on the following conditions, to-wit:

Whereas, the Western Union Telegraph Company, defendant in the above action, on the 5th day of May, 1914, appealed to the Supreme Court of Indiana from a judgment for one hundred dollars ($100.) and costs rendered in said action.

Now, if the said Western Union Telegraph Company shall duly prosecute said appeal to effect and abide by and pay the judgment and costs, which shall be rendered against it on said appeal, then this obligation shall be void; else in full force.

In witness whereof said parties have hereunto set their hands and subscribed their names this 6th day of May, 1914.

WESTERN UNION TELEGRAPH COMPANY,
By JOHN W. HAYES, *General Manager.*
C. E. BOND.

Filed Jun- 13, 1914. J. Fred France, clerk.

35 STATE OF INDIANA,
Allen County, ss:

John W. Hayes, on his oath, says that he is general manager of the Western Union Telegraph Company and is duly authorized to execute said bond and that as such general manager the Western Union Telegraph Company executed the same by him as such general manager.

JOHN W. HAYES.

Subscribed and sworn to this 6th day of May, 1914.

FLORENCE MERZ,
Notary Public. [SEAL.]

My commission expires May 16th, 1916.

And afterwards, on the 13th day of May A. D. 1914, the same being the 21st juridical day of the April Term, 1914, of said Court,

the following further proceedings were had by said Court in said Cause, to-wit:

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Bill of Exceptions Containing Evidence.

Comes now the defendant herein, and presents to the Court its bill of exceptions, containing a longhand transcript of the evidence in this cause, taken by the official reporter of this Court, which bill is now presented, signed by the Court and ordered filed with the Clerk, and the same is now filed with the Clerk and made a part of the record in this cause, which bill of exceptions is in these words:

36 Circuit Court. Filed May 13, 1914. Wm. E. Gerding, Clerk.

STATE OF INDIANA,
Allen County, ss:

In the Allen Circuit Court.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

Be it remembered that on the 20th day of March, 1914, of the February 1914 Term of the Allen Circuit Court of Allen County, Indiana, the Hon. John W. Eggeman, Judge, presiding, the above cause being at issue the same was submitted to the court for trial without the intervention of a jury and John C. Capron, the duly appointed, sworn and qualified official reporter of said court, was directed by said court to take down in shorthand all the evidence given in said cause, including both questions and answers and all the evidence offered in said cause, and all objections to the admission or rejection of evidence, all exceptions thereto, all offers to prove, all motions in relation thereto and to note all rulings in respect to the admission and rejection of evidence, offers to prove, motions to strike out and all objections and exceptions thereto.

And be it further remembered that said reporter took down, as directed, all the evidence given in said cause and correctly noted all the rulings in respect to the admission and rejection of evidence and all objections and exceptions thereto, all rulings on offers to prove, and all motions and exceptions thereto and said official reporter having been requested to furnish the defendant, The Western Union Telegraph Company, with a long-hand transcript and report
36½ of all the evidence and all the objections and exceptions thereto, all rulings thereon, all rulings on offers to prove and

motions and exceptions thereto, said transcript was made by said Reporter and filed on the 13th day of May, 1914, with the Clerk of said Circuit Court of Allen County, Indiana, and in said Clerk's Office, which said transcript after being so filed is now on this 13th day of May, 1914, incorporated herein, made part of this bill of exceptions and is in the following words and figures, to-wit:

37 The plaintiff now offers in evidence an agreement of parties as to certain facts.

Objection.

The defendant objects to each of the admitted facts because under the laws of the United States and penalties provided by the Interstate Commerce Commission by virtue of powers conferred upon it by law plaintiff is not entitled to recover the penalty sought in this action because the same has been abrogated by such laws and penalties.

Court: "In other words it is admitted that the facts as incorporated in this paper are correct."

Mr. Morris, Attorney for Defendant: "Yes, sir."

Court: "And they are the admitted facts for both parties."

Mr. Morris: "Yes, sir."

Court: "But that the defendant interposes an objection to each of the admissions solely to save the legal question."

Mr. Morris: "Yes, sir, the legal question."

Court: "As to what law prevails."

Mr. Morris: "Yes, sir."

Court: "Either the Statutes of the State of Indiana, or the Statutes of the United States."

Mr. Morris: "Yes, sir."

Clerk's office. Filed May 13, 1914. Wm. E. Gerding, Clerk.

38 The objection is now overruled by the Court to which ruling of Court the defendant at the time excepts.

Said agreement of parties as to facts in the case, is now submitted to the Court, introduced in evidence, and read, and is as follows, to wit:

Come now the plaintiff and the defendant and for the purpose of avoiding the necessity of taking certain depositions in the City of Chicago, Illinois, agree that the facts set forth below shall be read in evidence in this case as an agreed statement of facts herein contained, subject only to objections as to the materiality of the facts herein contained, to sustain the issues of this case.

Agreement as to Parts Read in Evidence.

1st. It is hereby agreed that at the times mentioned in the complaint, in this case, the defendant was an Electric Telegraph Company, duly organized as a corporation, and was engaged in the busi-

ness of transmitting telegraphic messages for the public, for hire, both in and between, the States of Indiana, and Illinois, and at all of such times, had and was operating, offices in the City of Chicago, Cook County, Illinois, and Fort Wayne, Indiana, and owned and operated at said times a line of wires connecting said Cities.

2nd. That on Wednesday, the Eighteenth (18) day of June, 1913, the plaintiff was the owner of a certain claim in the sum of three hundred and ninety one and sixty seven one hundredths dollars against one E. Gregg Davis, a resident of the City of Chicago, Illinois, and that some time prior to said date, he had employed as attorneys to prosecute said claim for him, one Arthur W. Parry, a regularly licensed and practicing attorney, in the City of Fort
39 Wayne, Indiana, and a firm of attorneys in the City of Chicago, Illinois, known as the La Fayette Mercantile Agency, which attorneys were regularly licensed to practice in the Courts of the said City of Chicago, Illinois. That sometime prior to said dates, said attorneys had instituted suit on said claim, in the Municipal Court of said City of Chicago, Illinois, which case was then pending in said Court, and waiting its turn for trial on the dockets of said Court. That plaintiff had instructed his said attorneys to watch the trial dockets of said Court and to notify him by telegraph as soon as said case reached its turn to be called for trial.

3rd. That on the eighteenth day of June, 1913, it became apparent that said case would be called for trial on the following morning, and said Lafayette Mercantile Agency, acting under the instructions of plaintiff, and within the scope of its said employment then delivered to defendant at its said office in the said City of Chicago, Illinois, at about 4:30 o'clock, on said eighteenth day of June, 1913, and during regular office hours of the defendant, to be transmitted to said Arthur W. Parry, and to be delivered to him as the said attorney of plaintiff, at the said City of Fort Wayne, Indiana, a certain telegraphic despatch, the original of which is filed herewith, and made a part of this agreement, and marked Exhibit "A."

4th. That said message was received by defendant for transmission and delivery to said Arthur W. Parry, on said eighteenth day of June, 1913, at 4.23 P. M. at its Chicago office, and by said office was wired to defendant's office at Fort Wayne, Indiana, and was received there at about 5 o'clock P. M. of said day; in consideration of the sum of twenty seven cents to be collected on delivery.

40 5th. That the case above referred to was called for trial at about 10 o'clock on the morning of the nineteenth day of June, 1913, and the defendant failing to appear, judgment by default could have been taken had the plaintiff been present to give his testimony; that plaintiff's said Chicago Attorneys endeavored to secure a continuance until the afternoon of said day, but were unable to do so, and the case was continued until the following morning, June 20th, 1913.

6th. That said case was again called on said 20th day of June, 1913, at about 11.30 o'clock, and the defendant defaulting, the

Court rendered judgment in full of plaintiff's said claim on his testimony after an hour's hearing.

7th. That the usual passenger trains on the lines of the Pennsylvania and the N. Y. Chicago, and St. Louis Railways left Fort Wayne on the said 18th and 19th days of Jun*d*, 1913 and duly arrived in Chicago, Illinois, according to schedule.

8th. That the usual passenger trains left Chicago, Illinois, on the said Pennsylvania Railroad, arrived in Fort Wayne, Indiana, according to schedule on said 19th day of June, 1913, and had plaintiff been present to give his testimony when said case was called on said date, he and his said attorney could have returned to Fort Wayne, Indiana, in the afternoon or evening of said day. A copy of which time schedule of the Pennsylvania Railroad is attached to this agreement, made a part hereof, and marked Exhibit "B."

40*a* EXHIBIT "A."

The Western Union Telegraph Company.

Incorporated.

25,000 offices in America. Cable service to all the world.

This Company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message. Errors can be guarded against only by repeating a message back to the sending station for comparison, and the Company will not hold itself liable for errors or delays in transmission or delivery of Unrepeated Messages, beyond the amount of tolls paid thereon nor in any case beyond the sum of Fifty Dollars, at which, unless otherwise stated below, this message has been valued by the sender thereof nor in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

This is an unrepeated message, and is delivered by request of the sender, under the conditions named above.

BELVIDERE BROOKS,
General Manager.

THEO. N. VAIL, *President.*

Received at 158, CH. M. 12 Collect. 133.

Chicago, Ill., June 18, ——.

Arthur W. Parry, Atty. at Law, Shoaff Bldg., Ft. Wayne, Ind.:

Have Boegli and other witness at our office eight A. M. Thursday.
LAFAYETTE MERCANTILE AGENCY."

40*b* The plaintiff now offers in evidence and reads to the Court the time tables of the Pennsylvania Railroad Company showing the time of departure and arrival of trains over its road from Fort Wayne to Chicago, Ills., a copy of which is as follows, towit—marked exhibit "B."

EXHIBIT "B."

(Here follow tables marked pages 41 and 42.)

CHART

TOO

LARGE

FOR

FILMING

43 *Evidence of John Hayes, Plaintiff Witness. Examination-in-Chief.*

JOHN HAYES, a witness for the plaintiff being duly sworn, testifies as follows, examined by Mr. A. W. Parry, counsel for the plaintiff:

Q. Your name?
A. John Hayes.
Q. Where do you live?
A. I live in the City of Fort Wayne, Indiana.
Q. What is your occupation?
A. I am employed by the Western Union Telegraph Company, as a manager of their office, at Forth Wayne Indiana.
Q. Were you so employed on the 18th and 19th days of June, 1913?
A. Yes sir.
Q. Were you personally in charge of the office on those days?
A. Yes sir.
Q. I now hand you the telegram marked Exhibit "A" in this case, being from the Lafayette Mercantile Agency, in Chicago, Illinois, to Arthur W. Parry, of Fort Wayne, Indiana, and I will ask you whether any effort was made to deliver this message.
A. Yes the message was sent with the boy to Mr. Parry's office in the Shoaff Building, at about 5.30 o'clock P. M. on the 18th day of June, 1913, the same day it was received.
Q. Was any further effort made to deliver said message during the day, the rest of that day, or the following night?
A. No, the message was held in the Fort Wayne office until the following morning, when it was delivered at Mr. Parry's office in the Shoaff Building.

44 Q. Were any messages received at the Fort Wayne office after the receipt of the message marked Exhibit "A," and delivered during the rest of the day of the following night and prior to the delivery of said message marked Exhibit "A?"
A. Yes.
Q. How many?
A. Between twenty and twenty-five.

45 *Admission as to Delivery of Dispatch by Defendant.*

It is further admitted by the parties, that about 5.30 P. M. of the 18th day of June, 1913, the defendant attempted to deliver a copy of this dispatch to A. W. Parry, at the Shoaff Building, "marked exhibit A," but that owing to the absence of Mr. Parry from his office it was not delivered till the next morning at 8.30 A. M., June 19th, 1913.

Evidence of A. W. Parry, Plaintiff's Witness. Direct Examination.

Mr. A. W. PARRY, a witness for the plaintiff is duly sworn, and testifies as follows, examined by A. W. Parry attorney for the plaintiff.

—. Your name.

A. A. W. Parry.

—. And you are the attorney for P. Boegli, the plaintiff in this case.

A. Yes sir. I am.

Q. And was the attorney for him in the case of Bogli against E. Gregg Davis, in Chicago, as stated in the admission.

A. Yes sir I was.

Q. On the 18th day of June 1913 where was your office?

A. My office then and for three or four years preceeding that was in the Shoaff Building, rooms 611 and 612, at the corner of Calhoun and Berry Streets, Fort Wayne, Indiana, one block from the office of the Western Union Telegraph Company.

Q. Where was your residence, where do you live?

A. My residence on the 18th of June, 1913, was at 1319
46 West Washington Street, City of Fort Wayne, and had been for a period of about 20 years, one mile about from the office of the Western Union Telegraph Company, in Fort Wayne, Indiana.

Q. Does the directory of the City of Fort Wayne for the year 1913 give your residence which you have described as your residence?

A. Yes, sir, it does, in large black type.

Q. And also gives your office address?

A. Yes, sir, gives my office address and the telephone number both for my office and my house.

Evidence of Plaintiff's Witness A. W. Parry on Cross-examination.

Cross-examination.

By Mr. Morris:

Q. Mr. Parry do you know whether after five o'clock you were at your residence on West Washington Street?

A. I do not recall what time I left the office on that day but it was somewhere between five and six o'clock.

Q. Were you at home about six o'clock.

A. I was at home at six, and I remained at home from six on to bed time.

Evidence of Plaintiff's Witness A. W. Parry on Redirect Examination.

Redirect examination.

By Mr. Parry:

Q. What other members of your family were in your house on June 18th, 1913, from five o'clock till 9?

A. I want to make another statement—that my father, and my sister were at home from the hour of five, till the next morning, and further that the bill for the telephone message was presented to me and paid by me for the plaintiff.

47 *Evidence of Plaintiff's Witness A. W. Parry on Recross-examination.*

Recross-examination.

By Mr. Morris:

Q. On what day did you pay the charges on the telegram as near as you can remember?

A. I do not recall the date of payment,—it was not on the date that the telegraom was delivered, the telegram was delivered at my office in my absence, but sometime afterwards. It was within two or three days, may be.

Q. Within two or three days?

A. Well, on presentation of the bill.

Admission as Receipt of Telegram in Usual Business Hours and Usual Charges.

It is further admitted by the parties, that when the telegram was received it was during the usual business hours of the day, was the usual business hours for receiving telegrams and that the charges collected were the usual charges for such telegrams.

This is all the evidence given in said cause.

48 Clerk's Office. Filed May 13, 1914. Wm. E. Gerding, Clerk.

Official Reporter's Certificate.

STATE OF INDIANA,
Allen County, ss:

I, John C. Capron, do hereby certify that I was at the time of the taking of the foregoing evidence the official reporter of the Allen Circuit Court of Allen County, Indiana, duly sworn and qualified according to law to perform the duties of that office and I further certify that as such reporter I was directed by the Hon. John W.

Eggeman, Judge of said Court, to take down in shorthand all the evidence in the cause wherein Peter Boegli is plaintiff and the Western Union Telegraph Company defendant and to note all the rulings of the court in respect to the admission and rejection of evidence, all objections and exceptions thereto and all offers to prove and motions to strike out and all objections and exceptions thereto; that the same was reported by me in shorthand as such official reporter and afterwards said shorthand manuscript and notes were extended and transcribed in long hand by me at the request of the Western Union Telegraph Company, defendant in said cause.

I further certify that the above and foregoing long hand typewritten manuscript and transcript of the evidence and rulings of the court in respect to the admission and rejection of evidence, exceptions thereto and offers to prove and motions to strike out were taken down in shorthand and extended in long hand as by me noted therein and that the above and foregoing long hand typewritten manuscript is a verbatim report of all such evidence and of all the evidence given on said trial, the admissions and rejections of evidence, objections, offers to prove, motions to strike out, rulings and exceptions thereto and that such transcript and long hand manuscript contains and is all the evidence given in said cause.

49 I further certify that I delivered said transcript to said Western Union Telegraph Company, defendant in said cause, as per its request therefor.

In witness whereof I have hereunto set my hand and subscribed my name, this 12th day of May, 1914.

JOHN C. CAPRON,
Official Reporter of Allen Circuit Court of Allen County, Indiana.

Clerk's Office. Filed May 13, 1914. Wm. E. Gerding, Clerk.

50 *Bill of Exceptions. Signing & Filing of Bill of Exceptions.*

And be it further remembered that the evidence as hereinbefore set out and all rulings of the court in respect to the admission and rejection of evidence, and all exceptions thereto and all rulings on offers to prove and exceptions thereto were reported and transcribed verbatim by said Official Reporter and the above and foregoing transcript and long-hand typewritten report of said Official Reporter contains and is all the evidence given in said cause and correctly sets forth all the rulings of the court upon the rejection and admission of evidence and exceptions thereto and all rulings on offers to prove and motions and exceptions thereto; that, as elsewhere appears of record, the court filed its written special finding of facts and conclusions of law on April 11th, 1914, the 60th Juridical Day of February 1914 Term of said court and thereafter, as elsewhere appears of record, the defendant on the first day of the April Term, 1914, of said court, being April 20th, 1914, filed its written

motion for a new trial, as elsewhere appears of record, which motion, as elsewhere appears of record, was overruled on May 5th, 1914, of the April 1914 Term of said court to which ruling defendant excepted at the time and defendant at the time asked and was granted sixty days' time, as elsewhere appears of record, in which to present and file its bill of exceptions and thereupon judgment, to which defendant excepted, was rendered in favor of plaintiff, as elsewhere appears of record, on said May 5th, 1914 and defendant at the time asked and was granted sixty days' time in which to present and file its bill of exceptions, and now on this 13th day of May, 1914, and within the time limited by the court the Western Union Telegraph Company, defendant, presents its bill of exceptions and prays that the same may be signed, filed and made a part of the record herein, which is accordingly done this 13th —.

J. W. EGGEMAN,
Judge of the Allen Circuit Court of Allen County, Indiana.

Circuit Court. Filed May 13, 1914. Wm. E. Gerding, Clerk.

51 *Defendant's Præcipe for Transcript for Appeal.*

Be it remembered, that on the 14th day of May, A. D. 1914, there was filed in the office of the Clerk of the Allen Circuit Court of Allen County, Indiana, a præcipe, which is in the words and figures following, to-wit:

STATE OF INDIANA,
Allen County:

Allen Circuit Court.

PETER BOEGLI

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

To the Clerk of the Allen Circuit Court, Allen County, Indiana:

You are hereby requested and directed by The Western Union Telegraph Company, defendant in the above cause, forthwith to prepare and certify to the Supreme Court of Indiana a full, true and complete transcript of the entire record in the above entitled cause, including a copy of the appeal bond and of this præcipe, except that you shall incorporate in the transcript the original bill of exceptions containing all the evidence given in said cause instead of a copy thereof.

BARRETT, MORRIS & HOFFMAN,
Attorneys for The Western Union Telegraph Company, Defendant.

52 *Clerk's Certificate.*

STATE OF INDIANA,
Allen County, ss:

I, Wm. E. Gerding, Clerk of the Allen Circuit Court of Allen County, State of Indiana, do hereby certify that the above and foregoing transcript contains full, true and correct copies, and the originals, of all papers and entries in said cause required by the above and foregoing præcipe.

I further certify that on the 13th day of May, 1914, there was filed in my office a long hand transcript of the evidence by the official reporter of said court, which is the same transcript of the evidence incorporated in the bill of exceptions containing the evidence made part of the foregoing transcript without copying, which said bill of exceptions was signed by the court and ordered made part of the record in this cause.

Witness my hand and seal of said Court at Fort Wayne, Indiana, this 18th day of May, 1914.

[SEAL.] WM. E. GERDING, *Clerk.*

Filed Jun- 13, 1914. J. Fred France, Clerk.

53 Filed Jun- 13, 1914. J. Fred France, Clerk.

Assignment of Errors.

In the Supreme Court of Indiana.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant,

vs.

PETER BOEGLI, Appellee.

Appeal from Allen Circuit Court of Allen County, Indiana.

The above named appellant says there is manifest error in the proceedings and judgment in this cause in this:

1st. The lower court erred in overruling appellant's separate demurrer to appellee's first paragraph of complaint.

2nd. The lower court erred in sustaining appellee's separate demurrer to appellant's second and third paragraphs of answer to the first paragraph of appellee's complaint.

3rd. The lower court erred in its conclusion of law, numbered one (1), upon the special finding of facts.

4th. The lower court erred in its conclusion of law numbered two (2) upon the special finding of facts.

5th. The lower court erred in its conclusion of law numbered three (3) upon the special finding of facts.

6th. The lower court erred in overruling appellant's motion for a new trial.

7th. The lower court erred in rendering judgment for appellee.

Wherefore appellant prays that the judgment of the lower court may be in all things reversed.

BARRETT, MORRIS & HOFFMAN,
Attorneys for Appellant.

54 And afterwards, to-wit: on the 13th day of July, 1914, the same being the 44th judicial day of the May Term 1914 of said Supreme Court, the following further pleas and proceedings were had in said cause to-wit:

Come now the parties, by their counsel, and this cause is submitted to the court for judgment and decree as provided by the act of the General Assembly of the State of Indiana, approved April 13, 1885, and the rules of said Supreme Court adopted in relation thereto, and notices thereof are duly issued.

55 And afterwards, to-wit: on the 1st day of September, 1914, the same being the 87th judicial day of the May Term, 1914, of said Supreme Court the following further pleas and proceedings were had in said cause to-wit

And comes no*t* the appellant, by counsel, and files its briefs in the words and figures following: (H. I.)

56 And afterwards, to-wit: On the 25th day of September, 1914, the same being the 98th Judicial Day of the May Term, 1914, of said Supreme Court the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files its petition for oral argument, in the words and figures following, (H. I.)

57 And afterwards, to-wit, *p*n the 8th day of October, 1914, the same being the 118th judicial day of said May Term 1914 of said Supreme Court, the following further pleas and proceedings were had herein.

Comes now the appellee, by counsel, and files his petition herein for an extension of time in which to file briefs which said petition is in the words and figures following to-wit: (H. I.)

And on the same day appellee's said petition for an extension of time was granted and time extended to and including October 24, 1914.

58 And afterwards, to-wit: on the 24th day of October, 1914, the same being the 132nd judicial day of the May Term 1914 of said Supreme Court the following further pleas and proceedings were had herein:

Comes now the appellee, by counsel, and files herein his briefs (8) which briefs are in the words and figures following, to-wit: (H. I.)

59 And afterwards, to-wit: on the 29th day of October, 1914, the same being the 134th judicial day of the May Term 1914 of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellee, by counsel, and files his petition for an oral argument in this cause, which said petition is in the words and figures following. (H. I.)

60 And afterwards, to-wit, on the 9th day of November, 1914, the same being the 145 judicial day of the May Term 1914 of said Supreme Court, the following further proceedings were had herein:

And comes now the appellant, by counsel, and files its motion to advance and notice for November 17, 1914, which said motion is in the words and figures following to-wit:

61 And afterwards to-wit on the 19th day of December, 1914, the same being the 24th judicial day of the November Term, 1914, of said Supreme Court, the following proceedings were had herein:

Comes now the appellant, by counsel, and files herein a petition for additional time in which to file reply briefs, said petition being in the words and figures following to-wit: (H. I.)

And after due consideration, by the Court, on the same day, said petition was granted and time extended to and including February 1, 1915.

62 And afterwards, to-wit: on the 9th day of March, 1915, the same being the 92nd judicial day of the November Term, 1914, of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellee, by counsel, and files herein his objections to further extensions of time, which said objection is in the words and figures following to-wit: (H. I.)

63 And afterwards, to-wit on the 11th day of March, 1915, the same being the 94th judicial day of the November Term 1914 of the Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellant, by its attorneys, and files herein its reply briefs (8) which briefs are in the words and figures following, to-wit: (H. I.)

64 And afterwards, to-wit: on the 23rd day of March, 1915, the same being the 104th judicial day of the November Term, 1914, the following further pleas and proceedings were had in said cause:

Comes now the parties, by their attorneys, and the Court being advised in the premises, advances said cause, on appellee's motion, heretofore filed herein and sets the above cause for oral argument on Friday, April 2, 1915, 45 minutes on each side, argument beginning at 10:30 A. M.

65 And afterwards, to-wit: on thd 2nd day of April, the same being the 113th Day of the November Term 1914 of said Supreme Court the following further proceedings were had herein.

Comes now the appellant and files herein his additional authorities (8), which said additional authorities are in the words and figures following: (H. I.)

And afterwards, to-wit: on the 13th day of April, the same being the 122nd judicial day of the November Term 1914 of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellee, by counsel, and files herein his additional authorities (8), which said additional authorities are in the words and figures following: (H. I.)

66 And afterwards, to-wit: on the 4th day of May, 1915, the same being the 14th judicial day of the November Term, 1914, of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files additional authorities (8) which additional authorities are in the words and figures following: (H. I.)

And afterwards, to-wit: on the 8th day of February, 1917, the same being the 64th judicial day of the November Term, 1916, of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files herein additional authorities (8), which additional authorities are in the words and figures following: (H. I.)

67 And afterwards, to-wit: on the 17th day of April, 1917, the same being the 122nd judicial day of the November Term, 1916, of said Supreme Court, the following further pleas and proceedings were had herein:

Come the parties, by their attorneys, and the Court being advised in the premises, affirms the judgment of the Court below with the following opinion pronounced by Harvey, J., a copy of said opinion being next hereto attached.

68 THE STATE OF INDIANA:

In the Supreme Court, November Term, 1916, on the 17th Day of April, 1917, Being the 122nd Judicial Day of said November Term, 1916.

Hon. Moses B. Lairy, Chief Justice; Hon. Richard K. Erwin, Hon. John W. Spencer, Hon. David A. Myers, Hon. Lawson M. Harvey, Associate Judges.

No. 22664.

In the Case of

WESTERN UNION TELEGRAPH COMPANY

vs.

PETER BOEGLI.

Appealed from the Allen Circuit Court.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by

69 HARVEY, *J.*:

Appellee sued appellant for the recovery of a penalty provided by statute of Indiana, in sections 5780 and 5781, Burns' Revision of 1914, for failure to deliver a telegram "with impartiality and good faith, and in the order of time in which it was received."

Appellant also filed a second paragraph of complaint seeking to recover special damages; but this paragraph was dismissed before the trial.

A demurrer was overruled to the first paragraph of complaint. The defendant answered in three paragraphs; a demurrer was sustained to the second and third. All the matters set up in the second regarding diligence in effort to deliver were provable under the general denial of negligence charged in the complaint. The third paragraph of answer alleges that Congress, by the Act of June, 1910, had severed interstate communications from state regulation, and had conferred upon the Interstate Commission power over the same.

The facts out of which this controversy grew are, in short, that the appellee was a party to litigation pending in Chicago; that he was represented by his attorney at Chicago and by his attorney at Fort Wayne. On the day preceding that on which said cause in Chicago was to be tried, plaintiff's attorney in Chicago sent "collect" to plaintiff's attorney in Fort Wayne a dispatch in the following words: "Have Boegli and other witnesses at our office at eight A. M. Thursday. This telegram was received by appellant's office in Fort Wayne about five o'clock P. M. on the day on which it was delivered to appellant, and during appellant's office hours, but because the attorney in Fort Wayne was not in his office until about 8:30 o'clock next morning, said telegram was not delivered until that hour, although said attorney was at his home in Fort Wayne during all of the time between the receipt of said telegram and said delivery, and said attorney's address was given in the Fort Wayne city directory and in the telephone directory, and his home was connected by telephone.

The points made here are:

(1) The penalty in this case cannot be recovered because
70 the message was not prepaid.

(2) The penalty cannot be recovered because the contract for the transmission of the message was made out of this state.

(3) Only the sender of a message can recover the penalty.

(4) In the Act of Congress of June 18, 1910, Federal Statutate Annotated, Supplement 1, pages 111-117, telegraph companies doing an interstate commerce business are declared common carriers, and have been placed wholly under the supervision of the Interstate Commerce Commission subject to the same rules, regulations, restrictions and penalties that are imposed on other common carriers, and that therefore the Indiana statute is superseded.

The telegram here involved was accepted by appellant in Chicago under an arrangement that the charge therefor should be collected in Fort Wayne, and said charge is shown to have been paid within two or three days after the receipt of the message.

The court held in Western Union Telegraph Company vs. Henley, 157 Ind. page 90, that "Appellant (telegraph company) had the right to exact cash in advance, and also had the right to waive it. If appellant elected to accept business on credit, there arose the same duties that follow cash payment."

Appellant cites upon this proposition Western Union vs. Mossler, 95 Ind. 29. This decision involved a contract made when the statute provided that the company shall "on payment or tender of the usual charges, according to the regulations of the company, transmit," etc. The telegram in that case was sent collect. It was held that as the sender "accepted the company's waiver of payment in advance" he "therefore waived the statutory penalty." The statute referred to in said decision was amended in 1885. The amendatory statute, which continues in force, omitted the words above quoted, and provided for transmission "Upon the usual terms" and the ruling in the Henley case was based upon the statute as so amended, and governs the decision in this case.

Proposition- numbers two and three can be fairly considered together.

It has been held that the penalty cannot be collected, be-
71 cause of the negligence of the telegraph company in the delivery of a message deposited with the company in another state for transmission to a point in this state. Carnahan v. Western Union Telegraph Co. 89 Ind. 526.

It is further held that only the sender of such an interstate message is entitled to recover the statutory penalty. Western Union Telegraph Co. v. Reed, 96 Ind. 196; Western Union Telegraph Co. v. Pendleton, 95 Ind. 12 (Reversed on another point in 122 U. S. 3470); Hadley v. Western Union Telegraph Co. 115 Ind. 191.

If the holdings above referred to apply to the facts in this case, this case is thereby decided in favor of the appellant. The ruling last above stated is, however, based upon the further ruling that the right to recover the penalty depends upon the existence of a contract for the transmission and upon privity of contract in the plaintiff, and is to the effect that only the sender is a party to such contract.

It is held that an undisclosed principal in whose interest a contract is made for the transmission of a telegram may recover the penalty. Western Union Telegraph Co. v. Troth, 43 Ind. App. p. 7, and cases cited. See also discussion in Millikan v. Western Union Telegraph Co. 110 N. Y. 403; S. C. L. R. A. 281; Western Union Telegraph Co. v. Schriver, 141 Fed. 538, S. C. 4. L. R. A. (n. s.) 686. The facts disclose that the contract for this message was made by plaintiff through plaintiff's agent in Chicago for the transmission to plaintiff, through plaintiff's agent in Indiana, of the message in a matter connected with such agency, and for the sole use and benefit of the plaintiff. The paramount feature of the execution of said contract by appellant, for the benefit of said undisclosed principal, was the proper and diligent delivery in Indiana of said telegram. The plaintiff was, therefore, both the sender and the receiver and the contractor for delivery of said dispatch, and, within the contemplation of the statute, is the party "aggrieved," who, according to the statute, is entitled to recover the penalty.

72 We have not been referred to, nor have we found, a decision in the Indiana reports expressly deciding that the receiver who is also the sender of an interstate dispatch may recover, but we believe that to so hold is right in view of the legal principle involved, and is supported by a clear inference from cases somewhat similar. Western Union Telegraph Co. v. Kinney, 106 Ind. 468; Western Union Telegraph Co. v. Fenton, 52 Ind. 1.

This leads us to the conclusion that appellee is entitled to recover the statutory penalty, unless Congress has by enactment, or the Interstate Commerce Commission has by regulation, made under the power granted to the Commission by Congress, so specifically regulated the delivery of interstate telegraphic messages as to exclude the power of the state to enforce its statute on the same subject.

There is no showing in the record in this case that the Interstate Commerce Commission has made any regulation affecting the delivery of telegrams. Appellant does not so claim in its brief.

The mere granting by congress to such commission of the power to do so is not sufficient to exclude the operation of a state statute. As to this the Supreme Court of the United States, in Southern Railway Company v. Reed, 222 U. S. 424, (op. 436) says:

"The mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, change the rule that Congress by non-action leaves power in the states over merely incidental matters. In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not, of itself and in the absence of action by the commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Until specific action by Congress or the commission the con-

73 trol of the state over these incidental matters remains undisturbed." See also Missouri Pacific Railway Co. v. Larabee Mills, 211 U. S. 612.

We are, therefore, called upon to consider only whether Congress has passed an Act directly superseding the power of the state.

Neither the commerce clause of the United States Constitution, nor the fact that Congress has power to make provisions regulating interstate common carriers, including Telegraph companies, renders invalid a state statute regulating the delivery of interstate telegrams until Congress has acted, and by such action covered the specific matter governed by the state statute. Pittsburgh etc. Railway Co. v. State, 172 Ind. 147.

The opinion of this court in the above cause was adopted by the Supreme Court of the United States in its general order of affirmance. (See 223 U. S. 713.) The opinion held valid what is commonly known as the "full crew act" of this state, and among other things, says of the Act. * * * "it may be permitted to stand until Congress sees fit to enter the field and actually legislate upon the precise subject-matter, in which event the statute in question would have to yield."

In the case last above cited, in making a comparison between the Indiana "full crew act" and regulations by Congress relating to interstate trains, the court announced rules which are applicable here in a like comparison. The court says:

"Appellant's counsel argue that Congress has already entered the field of legislation for the safety of employes and passengers on interstate trains, and the fact that Congress has not seen fit to prescribe any specific rules in regard to the number of men required to operate interstate trains does not affect the question. In support of this claim we are referred to Acts of Congress requiring the cars of interstate trains to be equipped with automatic couplers, and other acts mentioned and set up by counsel, as hereinbefore stated. This argu-

*em*nt, however, has been rejected by the Supreme Court of the
74 United States. (Citing decisions.)

The court further says, on said subject, that such state regulations "are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated on the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits." Western Union Telegraph Co. v. Crovo, 220 U. S. 364. See also Vandalia R. R. Co. v. Public Service Commission, U. S. Sup. Ct. 37 S. C. R. 93, affirming 182 Ind. 382.

In its opinion in Western Union Telegraph Co. v. James, 162 U. S. 650, which was an action for recovery of a penalty for failure to deliver a telegram in the State of Georgia, which has been deposited in another state for such transmission to Georgia, the Supreme Court of the United States, referring to the Georgia statute, says:

In one sense it affects the transmission of interstate messages, because such transmission is not completed until the message is delivered to the person to whom it is addressed, or reasonable diligence

employed to deliver it. But the Statute can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states. It would not unfavorably affect or embarrass it in the course of its employment, and hence until Congress speaks upon the subject it would seem that such a statute must be valid. It is the duty of a telegraph company which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed, with reasonable diligence and in good faith. That is part of its contract, implied by taking the message and receiving payment therefor.

The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the
75 absence of any such statute, and is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of the penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not." See also: Chicago, R. I. Co. & Pac. Co. v. Arkansas, 219 U. S. 453, op. 460; Atlantic etc. R. R. Co. v. Mazursky, 216 U. S. 122; Western Union Tel. Co. v. Milling Co., 218 U. S. 406, op. 416.

The Act of Congress affecting interstate commerce, in its original scope, literally affected common carriers engaged in the transportation of persons and property. Later, although such common carriers as transmitted dispatches by wire or wireless, by express mention, were included by amendment of the Act of Congress, very little, if any, change was made in the wording of the Act on the subject of transportation and delivery. There is nothing in the Act that expressly provides against, or a penalty for, negligence in delivery of interstate commerce by any common carrier.

A construction of said Act to include negligence is prevented by Section 10, Vol. 1, Fed. Statutes Annotated, p. 117, which provides that any common carrier, or any person representing such common carrier, who shall wilfully do, or cause to be done, or shall willingly suffer or permit to be done, any act, matter or thing in this Act prohibited, or who shall wilfully omit or fail to do any such act, or who shall cause or wilfully suffer or permit any act, matter or thing so directed or required by this Act to be done, shall be guilty of an infraction of this Act and shall upon conviction be subject to a fine not to exceed five thousand dollars.

76 In our opinion the provisions of the Act of Congress relate specifically to and provide a penalty for only such conduct as is the result of deliberation and intention, and do not relate to mere neglect in individual cases provided against by the Indiana statute, or by the common law, and such construction is further sup-

ported by Pa. R. R. Co. v. Puritan Coal Mining Co., 237 U. S. 120, and others hereinafter cited.

It is held in Western Union Telegraph Co. v. Bilisoli, (Va.) 82 S. E. 91, that the Act of Congress impliedly exempts telegraph companies from any penalty for negligence.

The Indiana statute in question not only provides against what may be termed intentional discrimination in delivery of such messages, but against negligence in such delivery, and names a penalty applicable thereto. Western Union Telegraph Co. v. Braxton, 165 Ind. 165.

The state has deemed it proper in the exercise of its police power for the benefit of its citizens, to prescribe that such dispatches shall be diligently delivered, and a penalty for negligence in delivery.

The Interstate Commerce Act has not specifically covered this feature of the service, and has not, therefore, in this manner rendered inoperative the state statute.

It is true that the Act of Congress provides that all such carriers of interstate commerce, including telegraph companies, shall make regulations in relation thereto, and that the commission shall have power to determine whether the regulations and practices of the common carrier are unjust or unreasonable, or unjustly discriminatory, and to enforce such regulations, and for action by the Commission upon complaint; but this cannot be said to be a provision by Congress regulating either generally or specifically. It rather leaves to such carrier the making of such regulations, and on such features of its service as it may deem needful and reasonable. If, as has been shown, the mere grant by Congress to the Commission of power to make regulations is not an exclusion of the power of the state, the requirement that interstate carriers shall make regulations is not such an exclusion, especially in the absence of a
77 showing that the carrier has made such regulations as specifically cover negligence in delivery, and that this action of the carrier has been adopted or approved by the Commission.

The Interstate Commerce Act was amended June 18, 1910. Since said amendment it has been held in quite a number of the states that by this amendment Congress has not only entered the field of regulation of interstate telegraphic business, but has entirely covered the subject to the exclusion of all state laws relating thereto.

These decisions are to a great extent based upon Western Union Telegraph Co. v. Brown, 234 U. S. 542. We understand the essence of this decision to be that a state may not enforce a liability or penalty provided by and peculiar to the state where an action is brought for negligence occurring in another state, or in the District of Columbia; the other state, or the United States, respectively, having the exclusive jurisdiction as to the amount and measure of recovery; and further, this decision holds that whatever authority a state may possess over the delivery of interstate messages by telegraph companies within its limits, the state does not have power to regulate the delivery of messages in other states.

There is not involved by either of these propositions a decision

of the question as to whether under an Act of Congress, or action of the Interstate Commerce Commission, the matter of interstate commerce has been so exclusively taken over as to render nugatory all authority as to the several states in reference thereto.

Said decisions, based upon said amended Act of Congress, also cite on this point the decision in C. etc. R. Co. v. Rankin, 241 U. S. 319 (op. 327), and the following is quoted therefrom:

"It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with the strict requirements of the federal statutes, or become subject
78 to a heavy penalty; and in respect to transactions in the ordinary course of business, it is entitled to the presumption of right conduct."

It is claimed that said decision supports a rule that as Congress has required interstate carriers, including telegraph companies, to file with the Interstate Commerce Commission rules, regulations and practices adopted by them relating to interstate business, and has provided that the rules and regulations so filed shall be deemed reasonable and just until changed by the Interstate Commerce Commission, Congress has "not only taken possession of the field of interstate commerce by telegraph companies, but has also specici-ally prescribed the rules which shall govern the transaction of such commerce."

We do not so conclude from the decision in the Rankin case. In that case, the plaintiff, Rankin, had shipped over defendant's road a car-load of mules from Kentucky to Georgia, and had signed and accepted a through bill of lading which stated that it was a "Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates," and that for the lowest rate provided, the liability for negligent injury to horses and mules was not to exceed seventy-five dollars per head. The published freight rates provided an increased freight charge for a higher valuation. Some of the animals were killed in a wreck, and the shipper sued to recover at a valuation of two hundred and fifty dollars per head. The defendant answered that its liability for negligence was limited, as shown by the contract set out in the complaint, because it had published and filed with the Interstate Commerce Commission its rules and regulations as to such rates and limitations, and the freight-rate was chosen by the shipper.

In as much as a contract limiting liability for negligence is not valid in that respect unless the carrier's rules and regulations, as to limitation, are filed with the commission, it was argued that no federal question was presented in the above case, because there was no affirmative proof showing actual compliance by the road
79 with the Interstate Commerce Act. In discussing whether a federal question was involved the Supreme Court made the statement hereinbefore quoted; and further stated: "The law presumes that every man, in his private and official character, does his

duty until the contrary is proved; it will presume that all things are rightly done unless the circumstances of the case overturn this presumption."

The statement quoted applies only to the argument as to whether a federal question is involved, upholding a right of review by the federal court, and is not a holding that, by such presumption, the state law has been suspended. After this holding that such presumption is enough to sustain jurisdiction in the federal court, the court decides that as the signed agreement recited that lawful alternate rates, based upon alternate valuations, were offered, such recitals constitute such admissions by the shipper as to make a prima facie case against him, and that if he wishes to contradict his own admissions, the burden is upon him. Thus it will be seen that if this decision can be construed to hold that it will be presumed that an interstate carrier has filed its regulations and practices, and that the same are approved, such presumption is rebuttable.

Can it be that a rebuttable presumption, that the carrier has published and filed its rules and regulations covering the subject of the state statute, and that, by operation of law, they are approved because they are not disapproved by the commission, shows such action by Congress or by the Commission as to suspend the state's powers over the subject? To so hold borders on holding that whether the state's jurisdiction is interrupted depends upon an act of an interstate carrier; and it would further result that the state law would be suspended not in general and as to all carriers, as would be the result of an Act of Congress or an act of the Commission, but suspended as to a carrier which had complied and not suspended as to a carrier which had not complied. Such a diversity of effect may properly result, as between shippers and carriers, when the terms of their several contract liabilities are concerned, but such cannot be the result where the force of a state statute affecting all parties and carriers alike is involved. The holding that Congress must act, or the Interstate Commerce Commission, authorized by Congress, must act, upon the specific matter covered by the state statute before the state statute is rendered inoperative, and the holdings making careful distinction between specific matters covered by the Act of Congress and the state law, have not been destroyed by the amendment referred to, but remain as guides as to whether by any Act of Congress, or amendment thereof, or by any act of the commission, the state's powers have been superseded. Further support to our conclusion is found in Penn. R. Co. v. Puritan Coal Co. 237 U. S. 121, and Penn. R. Co. v. Sonman Coal Co. 37 Sup. Ct. Rep. 46 (decided December 4, 1916), wherein it is held that, for the recovery of damages occasioned by neglect of the carrier of its common law or statutory duty to furnish such cars as the needs of the shippers' business require, the state courts have jurisdiction, and that the manifest purpose of the proviso in section 22 of the Interstate Commerce Act, construed with sections 8 and 9 thereof, none of which were changed by the amendment of 1910, is to "make it plain that such appropriate common law and statutory

80

remedies as can be enforced consistently with the scheme and purpose of the Act are not abrogated or displaced." Said decisions further hold that the Act does not supersede the jurisdiction of the state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise by the Commission of administrative discretion. In other words, the Act covers such administrative matters as the filing of regulations and the justness and reasonableness of the same, but does not exclusively cover negligent failure by carriers to comply with the regulations filed, nor negligent performance of common law or statutory duties; and therefore does not render inoperative the common law or state statutory regulations which are in aid of interstate commerce, and not an interference therewith.

81-82 Congress has not by the amendment of 1910, as is claimed, rendered inoperative the state's statute.

Finding no error in the matters assigned, the judgment below is affirmed.

83 And afterwards, to-wit: on the 15th day of June, 1917, the same being the 17th judicial day of the May Term 1917 of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files its petition and briefs (8) for a rehearing herein, in the words and figures following, a copy of said petition being next hereto attached.

84 In the Supreme Court of Indiana.

No. 22664.

WESTERN UNION TELEGRAPH COMPANY, Appellant,

vs.

PETER BOEGLI, Appellee.

Appeal from Allen Circuit Court.

Appellant's Petition for Rehearing.

Appellant respectfully petitions the Court to grant a rehearing in the above entitled cause, for the reason that the Court erred in its opinion and decision in said cause as follows:

I.

The Court erred in holding that the only Federal question which it was called upon to consider was whether Congress had passed an act directly superseding the power of the State.

II.

The Court erred in holding that the fact that Congress has power to make provisions regulating common carriers, including telegraph companies, does not render invalid a state statute regulating the delivery of interstate telegrams, until Congress has acted and by such action covered the specific matters governed by the state statute.

III.

The Court erred in holding that the absence from the act of Congress of an express provision against negligence or a penalty for negligence in delivery of interstate commerce by a common carrier, had the legal effect of a total failure to legislate, either expressly or by implication, against such negligence.

85

IV.

The Court erred in holding that for the purpose of applying the Federal question presented by this appeal, the Indiana statute enacted in 1885 (Acts 1885, p. 151) which by its title is "An Act * * * prohibiting discrimination between patrons, etc.," was an act to punish negligence by telegraph companies and therefore was not within the purview of the Act of Congress punishing a wilful omission of the duty of transmission and delivery, whereas both the state statute and the Act of Congress referred to are directed to omissions of duty which amount to a discrimination between patrons.

V.

The Court erred in holding that the Indiana statute prohibiting discrimination between patrons was effective as against acts of negligence, and by implication holding that as to wilful discrimination it was not effective because the subject of wilful discrimination is covered by the Act of Congress.

VI.

The Court erred in holding that an Act of Congress which punishes wilful discrimination between patrons does not have the effect of suspending the operation of a state statute prohibiting discriminations between patrons.

VII.

The Court erred in holding that inasmuch as Congress in the matter of regulating interstate telegrams penalized only wilful discrimination, thereby it left the field open to the states to penalize negligent discrimination, whereas the action of Congress in the premises must be taken to have indicated an intent to occupy the

field of such regulation exclusively, and to prohibit any regulation by the state.

86 VIII.

The Court erred in holding in effect that the same act or omission by a telegraph company would create a liability for the state penalty in favor of the sender of the message for deliberate postponement of a telegram, whereas under the Federal act the same telegraph company would be liable for a penalty of not to exceed five thousand dollars in favor of the United States for such deliberate postponement.

IX.

The Court erred in holding that a statute whose purpose is declared in its title to be "An Act prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency," may be upheld, notwithstanding an Act of Congress penalizing discrimination by a telegraph company between patrons, where such discrimination is wilful and intentional.

X.

The Court erred in holding that the statute awarding a penalty to the sender of a message is an act in aid of interstate commerce, whereas the same, in view of the existence of acts of Congress covering the same field of regulation, is an obstruction of interstate commerce.

XI.

The Court erred in holding that for negligence in the transmission of the telegram in suit from Chicago, Illinois, to Fort Wayne, Indiana, the sender was entitled to recover the statutory penalty, whereas the penalty is only recoverable where the place from which the telegram in suit is sent is within the State of Indiana.

87 XII.

The Court erred in holding that Congress by the amendment of 1910 has not rendered the Indiana statute inoperative under the facts presented by the present appeal.

XIII.

The Court erred in affirming the judgment of the trial court.

XIV.

The Court should hold that a conflict between the state statute and the Act of Congress is not necessary in order that the Act of

Congress shall invalidate the state statute; that all that is required is that the Act of Congress should deal with the same subject matter. If the decision announced by the present appeal is to be the law of Indiana, a telegraph company which intentionally postpones a customer's dispatch would be liable to the sender for the statutory penalty, and on precisely the same state of facts would be answerable to the United States under the Act of Congress for a penalty of not to exceed five thousand dollars. The appellant would thus be twice penalized for the same omission of duty, and the conflict between state and federal legislation would be complete. Such a conflict is made possible by the decision which the appellant in the present appeal is asking this Court to review. When Congress legislates on the subject of interstate telegraphy it declares that there shall be a penalty of not to exceed five thousand dollars, in favor of the United States, in all cases of intentional delay, and this is equivalent to a declaration of the intent of Congress, (1) that no penalty shall be recoverable by anyone except the United States; (2) that no penalty shall be recovered for a delay that is not wilful; and
88 (3) that the amount of the penalty shall be an elastic and not a fixed sum, and shall be limited only by the statutory maximum of five thousand dollars.

Such a conclusion, it seems to us, is inevitable, if this Court accepts as authoritative the cases cited by the appellant and if its decision is not to conflict with those of the federal courts and the courts of last resort in a large number of the states of the Union.

Inasmuch as this case was argued orally before the full bench two years ago, and the opinion deciding the case was written by a judge who was not a member of the Court when the argument was had, and some of the authorities there cited and subsequently cited have been ignored in the opinion, appellant earnestly petitions the Court for leave to present the Federal question in an oral argument before the present bench.

SAMUEL O. PICKENS,
CHARLES W. MOORES,
R. F. DAVIDSON,
OWEN PICKENS,
Attorneys for Appellant.

ALBERT T. BENEDICT,
Of Counsel.

89 And afterwards, to-wit: on the 6th day of October, 1917, the same being the 112th judicial of the May Term 1917 of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellee, by counsel, and files his briefs (8) on appellant's petition for a rehearing, said briefs being in the words and figures following to-wit: (H. I.)

90 And afterwards, to-wit: on the 12th day of March, 1918, the same being the 92nd judicial day of the November Term, 1917, of said Supreme Court, the following further pleas and proceedings were had herein:

Come now the parties, by counsel, and the Court being sufficiently advised in the premises, now overrules the petition for a rehearing heretofore filed herein by the appellant.

91 And afterwards, to-wit: on the 15th day of March, 1918, the same being the 95th Judicial Day of the November Term, 1917, of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files in the office of the Clerk of the Supreme Court, his petition for the allowance of a writ of error into the Supreme Court of the United States, said petition being hereto next below attached, and being as follows:

92 STATE OF INDIANA:

In the Supreme Court.

No. 22664.

WESTERN UNION TELEGRAPH COMPANY, Appellant,

vs.

PETER BOEGLI, Appellee.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of Indiana:

Appellant, Western Union Telegraph Company, prays for a writ of error from the Supreme Court of the United States to the Supreme Court of Indiana to review the judgment of said Supreme Court of Indiana in the above entitled cause, and for cause thereof alleges that by the opinion and judgment of the Supreme Court of Indiana affirming the judgment of the Circuit Court of Allen County, Indiana, in this cause, the appellant, Western Union Telegraph Company, has been denied the rights, privileges, and immunities which it claimed and to which it was entitled under the Constitution of the United States, and particularly of Article One, Section Eight thereof; and that by said opinion and judgment of the Supreme Court of the State of Indiana has held that a statute of Indiana, to-wit, the Act of April 18, 1885 (Acts of 1885, page 151) is valid and in full force and has not been superseded by the Act of Congress of June 18, 1910,

92½ as applied to the regulation of the transmission and delivery of interstate telegraphic messages, notwithstanding the Constitution of the United States, and Article One, Section Eight thereof; all of which is more fully shown by appellant's assignment of errors filed herewith.

WESTERN UNION TELEGRAPH COMPANY, *Appellant,*
By PICKENS, MOORES, DAVIDSON & PICKENS, *Its Attorneys.*

ALBERT T. BENEDICT,
Of Counsel.

93 [Endorsed:] No. 22664. In the Supreme Court. Western Union Telegraph Co., Appellant, vs. Peter Boegli, Appellee, Petition for writ of error. Pickens, Moores, Davidson & Pickens, Attorneys for Appellant, 1300 Fletcher Trust Building, Indianapolis, Filed Mar. 15, 1918. J. Fred France, Clerk.

94 And afterwards, to-wit: on the 19th day of March, 1918, the same being the 98th Judicial day of the November Term 1917 of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files an Assignment of Errors in the Supreme Court of the United States, on the writ of error herein, said assignment of errors being hereto next below attached, and being as follows:

95 STATE OF INDIANA:

In the Supreme Court.

No. 22664.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

vs.

PETER BOEGLI, Defendant in Error.

Assignment of Errors.

The plaintiff in error, Western Union Telegraph Company, for its assignment of errors, says that there is manifest error in the decision and judgment of the Supreme Court of Indiana in the above entitled cause, in the respects following, to-wit:

1. That the said Supreme Court of Indiana erred in holding and deciding that the mere grant by Congress to the Interstate Commerce Commission of power to regulate the transmission and delivery of interstate telegrams is not sufficient to exclude the operation of a state statute.

2. That the said Supreme Court of Indiana erred in holding and deciding that there could be a recovery of a penalty under the Indiana statute of April 8, 1885, entitled, "An Act prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency," (Acts 1885, p. 151), in a case where the tele-

96 gram for the delay in the transmission and delivery of which such penalty was sought, was filed in the State of Illinois for transmission to Indiana and delivery in the State of Indiana, notwithstanding the Act of Congress of June 18, 1910, whereunder and whereby jurisdiction and control of the transmission of interstate telegrams has been taken over by the United States Government and vested in the Interstate Commerce Commission.

3. That the said Supreme Court of Indiana erred in holding and deciding that the Act of Congress of June 18, 1910, which provides that telegraph companies doing an interstate business are common carriers and are wholly under the supervision of the Interstate Commerce Commission and subject to the same rules and regulations imposed upon other common carriers, does not supersede the Indiana statute imposing penalties for discrimination in the transmission of interstate messages and for the breach of certain duties in relation to such transmission.

4. That the said Supreme Court of Indiana erred in holding and deciding that Congress has passed no act directly superseding the power of the State to regulate the transmission and delivery of interstate telegrams.

5. That the said Supreme Court of Indiana erred in holding and deciding that the power of the State of Indiana to regulate the transmission and delivery of interstate telegrams could only be suspended by an Act of Congress directly superseding the same, and was not suspended in the present instance if the Act of Congress herein interpreted indirectly and by implication superseded such power of the State.

6. That the said Supreme Court of Indiana erred in holding and deciding that the Indiana telegraph penalty statute (Acts 1885, p. 151) imposes a penalty for mere negligence in the transmission and delivery of interstate telegrams, and that the Interstate
97 Commerce Commission, under the authority of Congress, has not assumed jurisdiction and control over interstate telegraphy so far as concerns the negligent transmission of dispatches.

7. That the said Supreme Court of Indiana erred in holding and deciding that Congress, by the Act of June 18, 1910, has not rendered inoperative the Indiana statute of 1885, (Acts 1885, p. 151), regulating the transmission and delivery of telegrams, so far as the same is sought to be applied to telegrams filed in another state than Indiana for transmission to the State of Indiana and delivery in the State of Indiana.

8. That the said Supreme Court of Indiana erred in holding and deciding that the assumption by Congress of jurisdiction and control over the regulation of intentional delays in the transmission of interstate telegrams is not in effect a superseding or suspension of said regulation of such delays if caused by negligence, or of said power further to regulate and punish such delay.

9. That the said Supreme Court of Indiana erred in holding and deciding that the issues in said cause did not involve a decision of the question as to whether under an Act of Congress or action by the Interstate Commerce Commission the matter of interstate commerce has been so exclusively taken over as to render nugatory the authority of the several states in reference thereto.

10. That the said Supreme Court of Indiana erred in holding and deciding that the Indiana statute regulating the transmission of telegrams (Acts 1885, p. 151) is still in force and valid as to telegrams filed in another state than Indiana for transmission to

Indiana and delivery in Indiana, notwithstanding the subject
98 matter of such regulation is within the commerce power of Congress and has been taken over by Congress pursuant to that power as conferred by Article One, Section Eight, of the United States Constitution.

That in so deciding and in affirming the judgment of the Circuit Court of Allen County, Indiana, in this action, plaintiff in error has been denied the protection conferred upon it by Article One, Section Eight, of the United States Constitution, and particularly that clause thereof which prescribes that "Congress shall have power * * * to regulate commerce * * * among the several states," and in each of said holdings the decision of said Indiana Supreme Court is in violation of said provision of the United States Constitution last cited and quoted.

Wherefore, Western Union Telegraph Company, plaintiff in error, prays that the judgment of the Supreme Court of Indiana in this cause be in all things reversed.

WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error,*
By PICKENS, MOORES, DAVIDSON & PICKENS,
SAMUEL O. PICKENS,
CHARLES W. MOORES,
ROBERT F. DAVIDSON,
OWEN PICKENS,
Its Counsel.

ALBERT T. BENEDICT,
Of Counsel.

[Endorsed:] No. 22664. In the Supreme Court. Western Union Telegraph Company, plaintiff in error, vs. Peter Boegli, defendant in error. Assignment of errors. Pickens, Moores, Davidson, & Pickens, attorneys for plaintiff in error, 1300 Fletcher Trust Building, Indianapolis. Filed Mar- 19, 1918. J. Fred France, clerk.

99 And afterwards, to-wit: on the 19th day of March, 1918, the same being the 98th Judicial Day of the November Term, 1917, of said Supreme Court, the following further proceedings were had herein.

Comes now the appellant, by counsel, and files a writ of error from the Supreme Court of the United States, to the said Supreme Court of Indiana, in this cause, said writ of error being hereto next below attached, and being as follows:

100 UNITED STATES OF AMERICA:

The President of the United States of America to The Honorable the Judges of the Supreme Court of Indiana, Greeting:

Because in the record and proceedings, as also on the rendition of the judgment of a plea which is in the said District Court, before

you, between Western Union Telegraph Company and Peter Boegli a manifest error hath happened, to the great damage of the said Western Union Telegraph Company as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of said District Court, this 19th day of March, A. D. 1918.

[Seal of the District Court of the United States, District of Indiana.]

NOBLE C. BUTLER,
Clerk of the District Court of the United States for the District of Indiana.

Copy of above writ for the defendant in error lodged in the Clerk's Office of the Supreme Court of Indiana on the 19th day of March, 1918.

In obedience to the above writ I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the above entitled cause, this 4th day of April A. D. 1918.

[Seal of the Supreme Court, State of Indiana, MDCCCXVI.]

J. FRED FRANCE,
Clerk of the Supreme Court of Indiana.

101 [Endorsed:] No. 22664. District Court of the United States for the District of Indiana. Western Union Telegraph Company, plaintiff in error, vs. Peter Boegli, defendant in error. Writ of error to the Supreme Court of the United States.

102 And afterwards, to-wit: on the 19th day of March, 1918, the same being the 98th Judicial Day of the November Term 1917, of said Supreme Court, the following further pleas and proceedings were had in said Court in said cause:

Comes now the appellant, by counsel, and files his bond on appeal to the Supreme Court of the United States, in the penal sum of Five

Hundred Dollars ($500.00), which bond is taken and approved, a copy being hereto next below attached, and being as follows:

103 *Bond.*

Know all men by these presents, that we, Western Union Telegraph Company, as Principal, and American Surety Company of New York, as Surety, are held and firmly bound unto Peter Boegli in the sum of Five Hundred Dollars ($500.00), to be paid to the said Peter Boegli or his assigns, to which payment, well and truly to be made, we bind ourselves, our successors, and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of March, 1918.

Whereas, lately, to-wit: on the 12th day of March, 1918, at a term of the Supreme Court of Indiana, in an action pending in said court between said Western Union Telegraph Company as Appellant, and said Peter Boegli, as Appellee, a judgment was rendered against said Appellant, affirming the judgment of the Circuit Court of Allen County, Indiana, in favor of said Appellee, and against said appellant, for the sum of One Hundred Dollars ($100.00) and costs; and the said Appellant having obtained a writ of error and filed a copy thereof in the Clerk's office of said Supreme Court of Indiana, to reverse the judgment of said Supreme Court of Indiana in said action, and a citation directed to the said Peter Boegli, citing and admonishing him to be and appear in the Supreme Court of the United States, at Washington, D. C., within thirty days from the date thereof;

Now, the condition of the above obligation is such that if the said Western Union Telegraph Company shall prosecute said writ of error to effect and answer all damages if it fail to make its plea good, then this obligation to be void, otherwise to remain in full force and virtue.

WESTERN UNION TELEGRAPH COMPANY, *Principal,*
By PICKENS, MOORES, DAVIDSON & PICKENS, *Attys.*
AMERICAN SURETY COMPANY OF NEW YORK, *Surety,*
By E. V. CLARK,
Resident Vice-President.

Attest:
[SEAL.] D. M. LARSEN,
Resident Asst. Secretary.

Approved, this 19th day of March, 1918.
JOHN W. SPENCER,
Chief Justice of the Supreme Court of Indiana.

Filed Mar. 19, 1918. J. Fred France, Clerk.

104 And afterwards, to-wit: on the 28th day of March, 1918, the same being the 106th Judicial Day of the November Term 1917 of said Supreme Court, the following further pleas and proceedings were had in said Court, in said cause:

Comes now the appellant, by counsel, and files his citation on said writ of error, duly signed by Hon. John W. Spencer, Chief Justice of this Court, and proof of service of citation on the attorney for the defendant in error, said citation and proof of service thereof being hereto next below attached, and being as follows:

105 UNITED STATES OF AMERICA, *ss:*

To Peter Boegli, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the United States, wherein Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. John W. Spencer, Chief Justice of the Supreme Court of Indiana, this 19th day of March, in the year of our Lord One Thousand Nine Hundred and Eighteen.

JOHN W. SPENCER,
Chief Justice Supreme Court of Indiana.

I, Arthur W. Parry, attorney for Peter Boegli, the defendant in *w*rror in the writ of error referred to in the foregoing citation, hereby acknowledge service of the foregoing citation by receipt of a copy thereof this 22nd day of March, 1918.

ARTHUR W. PARRY,
Attorney for Peter Boegli, Defendant in Error.

106 [Endorsed:] No. 22664. In the Supreme Court of Indiana. Western Union Telegraph Co., plaintiff in error, vs. Peter Boegli, defendant in error. Citation. Filed Mar. 28, 1918, J. Fred France, Clerk. Pickens, Moores, Davidson, & Pickens, attorneys for plaintiff in error, 1300 Fletcher Trust Building, Indianapolis.

107 And afterwards, to-wit: on the 28th day of March, 1918, the same being the 106th Judicial Day of the November Term, 1917 of said Supreme Court, the following further pleas and proceedings were had herein:

Comes now the Appellant, by its attorneys, and files herein a præcipe for the record filed in the case of the Western Union Tele-

graph Company vs. Peter Boegli, No. 22664 on appeal to the Supeme Court of the United States, with notice and acknowledgement of service on appellee's attorney, which said præcipe is in the words and figures following being next hereto attached.

108 In the Supreme Court of Indiana.

No. 22664.

WESTERN UNION TELEGRAPH COMPANY, Appellant,

vs.

PETER BOEGLI, Appellee.

Appeal from the Allen Circuit Court.

Præcipe for Transcript of Record.

Hon. J. Fred France, Clerk of the Supreme Court of Indiana:

In making the return of the writ of error in the above entitled cause and the transcript of the record, please incorporate in such transcript the following portions of the record:

1. All of the transcript on appeal from the Circuit Court of Allen County, Indiana to the Supreme Court of Indiana.

2. The assignment of errors in the Supreme Court of Indiana, set forth on the transcript from the Circuit Court of Allen County, Indiana.

3. All of the record of the proceedings in the Supreme Court of Indiana except the briefs filed, including the opinion and decision of that court.

4. Appellant's petition for rehearing, and the ruling of the court thereon.

5. The petition for writ of error, the assignment of errors,
108½ the writ of error, the supersedeas bond on the writ of error, and the original citation, with the acknowledgment of service thereof.

WESTERN UNION TELEGRAPH COMPANY,
Appellant,
By PICKENS, MOORES, DAVIDSON & PICKENS,
Its Attorneys.

I, Arthur W. Parry, counsel for Peter Boegli, appellee in the above entitled cause, hereby acknowledge service of the foregoing præcipe by receiving a copy thereof, this 22nd day of March, 1918.

ARTHUR W. PARRY,
Attorney for Peter Boegli, Appellee.

109 [Endorsed:] No. 22664. In the Supreme Court. Western Union Telegraph Co., Appellant, vs. Peter Boegli, Appellee. Præcipe for Transcript of Record. Pickens, Moores, Davidson, &

Pickens, Attorneys for Appellant. 1300 Fletcher Trust Building, Indianapolis. Filed Mar. 28, 1918. J. Fred France, Clerk.

110 STATE OF INDIANA:

In the Supreme Court.

I, J. Fred France, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record of the proceedings had, papers filed, motions decided, rulings made, opinions delivered, judgments rendered, and all decrees and orders entered in the Supreme Court of Indiana, in the above entitled cause; also the original petition for the allowance of the writ of error, the original writ of error from the Supreme Court of the United States to the Supreme Court of Indiana, with the allowance thereof; the original citation to the defendant in error and proof of service thereof; and a copy of the original bond and its approval by the Chief Justice of said Supreme Court and the assignment of errors in the Supreme Court of the United States.

Which said transcript, annexed hereto, together with said original petition for the allowance of a writ of error, said original writ of error, original citation and original assignment of errors, and copy of the original bond, I hereby certify as and for my full return to said writ of error, in accordance with præcipe of appellant herein.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at the City of Indianapolis, this 4″ day of April, 1918.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

J. FRED FRANCE,
Clerk Supreme Court of Indiana.

Endorsed on cover: File No. 26436. Indiana Supreme Court. Term No. 969. Western Union Telegraph Company, plaintiff in error, vs. Peter Boegli. Filed April 15th, 1918. File No. 26436.

Supreme Court, U. S.
FILED
MAR 31 1919
JAMES D. MAHER,
CLERK

No. 488

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

against

PETER BOEGLI,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

RUSH TAGGART,
FRANCIS RAYMOND STARK,
Attorneys for Plaintiff in Error.

LECOUVER PRESS CO., Printers, 51 Vesey St., New York, N. Y.
Telephone: Cortlandt 5570 and 5571.

INDEX.

TABLE OF CASES CITED.

In the Supreme Court of the United States.

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BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is a writ of error to the supreme court of Indiana, bringing up for review a judgment of that court (record, p. 39) which, affirming a judgment of the circuit court of Allen County in the same State, held the plaintiff in error (defendant below) liable for the statutory penalty of $100 provided for by Indiana acts of 1885, page 151, for negligent delay in the delivery of an interstate telegram sent subsequently to the Act of Congress approved June 18, 1910 (36 Stat. L. 539).

The Indiana statute is as follows:

> "That every telegraph company with a line of wires wholly or partly within this State, and engaged in doing a general telegraphic business, shall, during the usual office hours, receive dispatches, whether from other telegraph lines, or other companies, or individuals, and shall, upon the usual terms, transmit the same with impartiality

and in good faith, and in the order of time in which they are received, and shall in no manner discriminate in rates charged, or words or figures charged for, or manner or conditions of service between any of its patrons, but shall serve individuals, corporations and other telegraphic companies with impartiality: *Provided, however,* That arrangements may be made with the publishers of newspapers for transmission of intelligence of general and public interest out of its order, and that communications for and from officers of justice shall take precedence of all others.

"Any person or company violating any of the provisions of this act shall be liable to any party aggrieved in a penalty of one hundred dollars for each offense, to be recovered in a civil action in any court of competent jurisdiction: *Provided,* Nothing in this act shall be construed to take away or abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations by injunction or otherwise."

This statute, although originally aimed at preference and discrimination only, and so construed by the Indiana supreme court as not to apply to cases of mere negligence (*W. U. T. Co.* v. *Jones,* 116 Ind. 361; *W. U. T. Co.* v. *Swain,* 109 Ind. 405; *W. U. T. Co.* v. *Steele,* 108 Ind. 163; *Hadley* v. *W. U. T. Co.,* 115 Ind. 191) has during the past two or three years been accorded a radically different construction, and is now held by the State courts to apply to practically all cases of negligent delay in transmission or delivery. (*W. U. Tel. Co.* v. *Braxton,* 165 Ind. 165; *W. U. Tel. Co.* v. *Ferguson,* 157 Ind. 64).

The Federal question presented for review is whether this statute, as applied to a message sent into Indiana from another State, is not annulled and superseded by the Act of Congress before mentioned, declaring telegraph companies engaged in the transmission of interstate and foreign telegrams to be common carriers, making the provisions of the act to regulate commerce applicable to them, and providing for penal liability for certain specified defaults in connection with interstate and foreign messages.

The facts are as follows: On June 18, 1913 (which was Wednesday), the Lafayette Mercantile Agency telegraphed from Chicago, Ill., to one Arthur W. Parry, an attorney at Fort Wayne, Ind.:

> "Have Boegli and other witness at our office eight A. M. Thursday."

The "Boegli" mentioned was the defendant in error (plaintiff below), and Parry, the addressee of the message, was his attorney in a pending lawsuit. This message was sent from Chicago at about 4:30 P. M. and received at the telegraph company's office at Fort Wayne, Ind., about 5 P. M. An attempt was made to deliver it at Parry's office, but he was not there, and instead of sending the message to his house, which was within the city limits of Fort Wayne and about one mile from the telegraph office, the telegraph company held the message until the following morning and delivered it to Parry at his office at about 8:30 A. M., too late to accomplish its purpose (record, pp. 27-33).

The complaint contained two counts, the first for the penalty and the second for $41.50 special damages (record, page 6); but the second count was subsequently withdrawn (page 17) and need not be considered. To the first count the defendant demurred (page 7), and when the demurrer was

overruled (page 9) answered by a general denial (page 11) and two affirmative defenses which were afterwards held bad on demurrer (page 17), so that the case proceeded to trial on the general denial. There was judgment for the plaintiff for the amount of the penalty, $100.00, which was affirmed by the supreme court of Indiana (115 N. E. 773, —Ind.—); and the case is now brought here for review on writ of error.

How the Federal Question Was Raised.

The Federal question was fully considered in the opinion of the supreme court of Indiana, and it is probably not necessary therefore to point out the particularity with which it was raised below. It was raised first by demurrer (page 7), to the overruling of which defendant excepted (page 9), one of the grounds of demurrer being as follows:

> "Because it is affirmatively averred in said first paragraph of complaint that the telegram or message set out in said paragraph was delivered to the office of this defendant at Chicago, Illinois, to be transmitted over its lines to Fort Wayne, Indiana, to be delivered at *a** point and was interstate commerce business and under such facts plaintiff would not be entitled to recover the statutory penalties sought to be recovered on said first paragraph because the Legislature of the State of Indiana under the facts averred would have no power to regulate commerce between the State of Illinois and State of Indiana or to impose a penalty on the facts alleged in said first paragraph of complaint."

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* Evidently a typographical error for "that."

The third affirmative defense, to which plaintiff's demurrer was sustained (page 11), was as follows:

> "And for a third paragraph of answer to the first paragraph of complaint defendant says that the message set out in said paragraph of complaint was an interstate message to be sent from a point in the State of Illinois to a point in the State of Indiana and was as such interstate commerce; *that by the Act of Congress approved June 18, 1910, the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph and thereby removed and exempted said interstate communication by telegraph from the field of state regulation or interference* and undertook to and did confer upon the Interstate Commerce Commission full power over all rates, charges, facilities, classifications, penalties and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce and in particular conferred the placing and imposing of all penalties against such telegraph companies upon said Interstate Commerce Commission and it has ever since retained and still retains such charge and by reason thereof the Legislature of the State of Indiana had no power to inflict on this defendant the penalty which is sought to be recovered in said first paragraph under the statute of Indiana, as the Legislature of said State of Indiana would have no power to regulate commerce between states and impose a penalty as sought to be recovered in said first paragraph of complaint; *that said Act of Congress nullified and rendered void the statute of Indiana on which*

plaintiff seeks to recover the penalty prayed for in said paragraph of complaint.

It was again raised at the trial by objections to evidence (page 27):

> "Because *under the laws of the United States* and penalties provided by the Interstate Commerce Commission by virtue of powers conferred upon it by law *plaintiff is not entitled to recover the penalty sought in this action because the same has been abrogated by such laws* and penalties."

Whereupon the following colloquy occurred:

> "Court: * * * The defendant interposes an objection to each of the admissions solely to save the legal question.
>
> "Mr. Morris: Yes, sir, the legal question.
>
> "Court: As to what law prevails.
>
> "Mr. Morris: Yes, sir.
>
> "Court: Either the statutes of the State of Indiana, or the statutes of the United States.
>
> "Mr. Morris: Yes, sir." (page 27).

But in any event the SUPREME COURT OF THE STATE FULLY UNDERSTOOD THE FEDERAL QUESTION RAISED, AND CONSIDERED AND DECIDED IT, as appears clearly from the following part of their opinion (record, pages 42-43 and 48):

> "This leads us to the conclusion that appellee is entitled to recover the statutory penalty, unless Congress has by enactment or the Interstate Commerce Commission has by regulation, made under the power granted to the Commission by Congress, so specifically regulated the delivery of interstate

telegraphic messages as to exclude the power of the state to enforce its statute on the same subject.

"There is no showing in the record in this case that the Interstate Commerce Commission has made any regulation affecting the delivery of telegrams. Appellant does not so claim in its brief.

"The mere granting by Congress to such commission of the power to do so is not sufficient to exclude the operation of a state statute. As to this the Supreme Court of the United States, in *Southern Railway Company* v. *Reid*, 222 U. S. 424 (op. 436), says:

" 'The mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, change the rule that Congress by non-action leaves power in the states over merely incidental matters. In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not, of itself and in the absence of action by the commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens.

" 'Until specific action by Congress or the commission the control of the state over these incidental matters remains undisturbed.' See also *Missouri Pacific Railway Co.* v. *Larabee Mills*, 211 U. S. 612.

"We are, therefore, called upon to consider only whether Congress has passed an Act directly superseding the power of the State.

* * * * * *

"Congress has not by the amendment of 1910, as is claimed, rendered inoperative the state's statute."

Errors Assigned.

1. That the said Supreme Court of Indiana erred in holding and deciding that the mere grant by Congress to the Interstate Commerce Commission of power to regulate the transmission and delivery of interstate telegrams is not sufficient to exclude the operation of a state statute.

2. That the said Supreme Court of Indiana erred in holding and deciding that there could be a recovery of a penalty under the Indiana statute of April 8, 1885, entitled, "An Act prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency" (Acts 1885, p. 151), in a case where the telegram for the delay in the transmission and delivery of which such penalty was sought, was filed in the State of Illinois for transmission to Indiana and delivery in the State of Indiana, notwithstanding the Act of Congress of June 18, 1910, whereunder and whereby jurisdiction and control of the transmission of interstate telegrams has been taken over by the United States Government and vested in the Interstate Commerce Commission.

3. That the said Supreme Court of Indiana erred in holding and deciding that the Act of Congress of June 18, 1910, which provides that telegraph companies doing an interstate business are common carriers and are wholly under the supervision of the Interstate Commerce Commission and subject to the same rules and regulations imposed upon other common carriers, does not supersede the Indiana statute imposing penalties for discrimination in the transmission of interstate messages and for the breach of certain duties in relation to such transmission.

4. That the said Supreme Court of Indiana erred in holding and deciding that Congress has

passed no act directly superseding the power of the state to regulate the transmission and delivery of interstate telegrams.

5. That the said Supreme Court of Indiana erred in holding and deciding that the power of the State of Indiana to regulate the transmission and delivery of interstate telegrams could only be suspended by an Act of Congress directly superseding the same, and was not suspended in the present instance if the Act of Congress herein interpreted indirectly and by implication superseded such power of the state.

6. That the said Supreme Court of Indiana erred in holding and deciding that the Indiana telegraph penalty statute (Acts 1885, p. 151) imposes a penalty for mere negligence in the transmission and delivery of interstate telegrams, and that the Interstate Commerce Commission, under the authority of Congress, has not assumed jurisdiction and control over interstate telegraphy so far as concerns the negligent transmission of dispatches.

7. That the said Supreme Court of Indiana erred in holding and deciding that Congress, by the Act of June 18, 1910, has not rendered inoperative the Indiana statute of 1885 (Acts 1885, p. 151), regulating the transmission and delivery of telegrams, so far as the same is sought to be applied to telegrams filed in another state than Indiana for transmission to the State of Indiana and delivery in the State of Indiana.

8. That the said Supreme Court of Indiana erred in holding and deciding that the assumption by Congress of jurisdiction and control over the regulation of intentional delays in the transmission of interstate telegrams is not in effect a superseding or suspension of said regulation of such delays if

caused by negligence, or of said power further to regulate and punish such delay.

9. That the said Supreme Court of Indiana erred in holding and deciding that the issues in said cause did not involve a decision of the question as to whether under an Act of Congress or action by the Interstate Commerce Commission the matter of interstate commerce has been so exclusively taken over as to render nugatory the authority of the several states in reference thereto.

10. That the said Supreme Court of Indiana erred in holding and deciding that the Indiana statute regulating the transmission of telegrams (Acts 1885, p. 151) is still in force and valid as to telegrams filed in another state than Indiana for transmission to Indiana and delivery in Indiana, notwithstanding the subject matter of such regulation is within the commerce power of Congress and has been taken over by Congress pursuant to that power as conferred by Article One, Section Eight, of the United States Constitution.

That in so deciding and in affirming the judgment of the Circuit Court of Allen County, Indiana, in this action, plaintiff in error has been denied the protection conferred upon it by Article One, Section Eight, of the United States Constitution, and particularly that clause thereof which prescribes that "Congress shall have power * * * to regulate commerce * * * among the several states," and in each of said holdings the decision of said Indiana Supreme Court is in violation of said provision of the United States Constitution last cited and quoted. (Record, pp. 53-55).

ARGUMENT.

Prior to the Act of Congress of 1910 there had been no Congressional legislation on the subject of the liability of telegraph companies for negligence in the transmission or delivery of interstate messages, either (1) with respect to the right of telegraph companies to *limit their liability*, (2) with respect to the *measure of damages applicable in such cases apart from limitations of liability* or (3) with respect to fines or *penalties* for intentional or merely negligent defaults.

By a long line of decisions of this court, the principle was recognized that *in the absence of Congressional legislation* on these subjects a State statute purporting to deal therewith was not necessarily unconstitutional under the commerce clause, but would be sustained as a valid exercise of the reserved police power of the State, provided it (1) imposed no additional burden, not already a part of the common-law and contract obligation of the telegraph company, and (2) was confined in its application to conduct within the territorial limits of the State.

W. U. T. Co. v. *James*, 162 U. S. 650.

Under these well-settled principles, statutes of Indiana and South Carolina, as construed in the particular cases, were held unconstitutional in *Western Union* v. *Pendleton*, 122 U. S. 347, and *W. U. T. Co.* v. *Brown*, 234 U. S. 542, because they undertook to regulate the conduct of the telegraph company beyond the borders of the State; while the Georgia statute in the James case, *supra*, and that of Virginia in *W. U. T. Co.* v. *Crovo*, 220 U. S. 364, on the other hand, were sustained because, as applied, they affected conduct within the territorial limits of the State only; and in *W. U. T. Co.* v. *Com-*

mercial Milling Company, 218 U. S. 406, an action for damages for negligence, a Michigan statute was sustained on the theory that as construed and applied it was in effect nothing more than a prohibition to the telegraph company *to contract, within the State of Michigan*, for certain limitations of liability which were declared contrary to local policy.

The Act of Congress of 1910.

All the decisions prior to this act rested on the fundamental fact that Congress had not legislated on the subject, and that the State statutes were valid only in the absence of such legislation and until such legislation took place.

The act of 1910 is clearly such legislation.

The Commerce Act as amended by this Act of June 18, 1910 (Ch. 309, 36 Stat. at Large 544, 8 Compiled Stats. 1916, page 9053), so far as it is material here, reads as follows (the portion in italics showing the amendments of June 18, 1910, so far as they relate to the question involved in this case):

> "Section 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artificial gas, by means of pipe lines or partly by pipe lines and partly by railroad, or partly by pipe lines, and partly by water, *and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory or District, of the United States to any other State, Territory or District of the United States, or any foreign country*, who shall be

considered and held to be common carriers within the meaning and purpose of this Act * * * provided, however, That the provisions of this Act *shall not * * * apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.* * * *

Paragraph (3), Section 1, declares:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property *and for the transmission of messages by telegraph, telephone or cable,* as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided, That messages by telegraph, telephone or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided, further, That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services.*"

And Section 3 reads:

"It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unrea-

sonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," etc.

24 *Stats. at L.* 380, 8 *U. S. Compiled Stats.* p. 9094, Sec. 8565.

Section 10 declares that:

"Any common carrier subject to the provisions of this Act * * * who * * * shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, * * * or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, * * * or shall be guilty of any infraction of this Act for which no penalty is otherwise provided * * * shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense, etc."

U. S. Compiled Stats. page 9174, Sec. 8574.

Section 15 provides that after a hearing upon

complaint made as provided in Section 13 of the Act or after hearing on an investigation by the Interstate Commerce Commission on its own initiative, the Commission may, if it sees fit, condemn any existing classifications, regulations, practices, rates or charges for the transportation of persons or property *"or for the transmission of messages by telegraph or telephone as defined in the first section of this Act,"* and the Commission is authorized and empowered to determine and prescribe what shall be the just and reasonable classifications, regulations, practices, rates or charges to be thereafter observed in such case.

Uniformity of Obligation the Manifest Purpose of the Act.

Prior to the act the limitations of liability which appear on the standard telegraph blank were sustained in some jurisdictions and repudiated in others. Prior to the act also certain extraordinary, not to say outlandish, elements of damage, such as "mental anguish," were recognized in some States and not elsewhere. Some States had adopted penalty statutes imposing a liability for fixed sums, irrespective of actual damage, for defaults in connection with the transmission of messages, and other States had no such statutes; while of the States in which such statutes existed some (such as New York and Arkansas) penalized only intentional discrimination and willful wrong, while others (such as Georgia, Mississippi, Virginia, Missouri) imposed the penalty for merely negligent acts or omissions. These penalties ranged in amount from $25.00 in Mississippi and Georgia to $500.00 in Arkansas. Under some acts the penalty was recoverable only by the sender; under others by either sender or addressee; in one case (Mis-

souri) two-thirds goes to the sender and the other third to the county school fund.

Obviously the prevention of discrimination of all sorts was the underlying and chief purpose of the act, involving as a necessary corollary the abolition of these and all other inequalities of obligation.

Adams Express Company v. *Croninger*, 226 U. S. 491.

It has accordingly been held, almost without exception, by both Federal and State courts, in cases arising since the passage of the act, that the States are no longer free to administer their varying local policies with respect either (1) to the VALIDITY OF THE LIMITATIONS OF LIABILITY in the contract for the transmission of an interstate telegram, or (2) the ELEMENTS OF DAMAGE WHICH ARE TO BE RECOGNIZED APART FROM SUCH CONTRACTUAL LIMITATIONS, but that as to both such matters they are bound, as are interstate carriers of goods and passengers, to recognize and apply the Federal rule. A complete list of the decisions of the appellate courts which have so held will be found in APPENDIX A. The only decisions to the contrary are in Texas[1] and Mississippi,[2] and one anomalous Arkansas case (*Des Arc Oil Company* v. *W. U. T. Co.*, 201 S. W. 273,— Ark.—), which seems totally irreconcilable with the other Arkansas decisions listed in the Appendix.

A typical expression of the reasons for the result which has been reached, so far as LIMITATIONS OF LIABILITY are concerned, is to be found in *Gardner* v. *W. U. Tel. Co.*, 231 Fed. 405:

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[1]Texas: *W. U.* v. *Bailey*, 108 Texas 427.

[2]Mississippi: *Dickerson* v. *Postal*, 114 Miss. 115; *Warren-Godwin Lumber Co.* v. *Postal*, 116 Miss. 660.

"Since the amendment above referred to we find no conflict in the authorities in cases where the facts are similar to the one at bar. Congress has taken possession of the field of interstate commerce by telegraph and it results that the power of the states to legislate with reference thereto has been suspended. The great necessity that commerce between the states should be free from such interference applies in a marked degree to interstate commerce by telegraph. **If the regulation which is pleaded in bar in this suit should be held valid in Kansas and void in Oklahoma,** *and the illustration may be extended to all the States of the Union,* **then the power of the United States to regulate commerce between the states in relation to telegraphic business would not only be interfered with, but destroyed."**

(It should be pointed out, before leaving this subject, that the ordinary limitations of liability found in the standard message blank, namely, the provision limiting liability for unrepeated messages to the amount received for sending the same, and the provision to the effect that a message shall be deemed to be valued at $50.00 unless specially valued, have been considered by the Interstate Commerce Commission in response to a complaint, and have been expressly determined by the Commission to be reasonable. *Cultra* v. *W. U. T. Co.*, 44 I. C. C. 670. For convenience this entire opinion is reprinted as APPENDIX B.)

A typical expression of the reasons for the result, with respect to recognizing the Federal rule as to the ELEMENTS OF DAMAGE APART FROM CONTRACTUAL LIMITATIONS OF LIABILITY, and thereby excluding the outlandish "mental anguish" recoveries, is to

be found in *W. U. Tel. Co.* v. *Schade*,—Tenn.—, 192 S. W. 924:

> "It is not to be doubted that, since the Congress by the passage of the amendatory act above referred to has entered the field and assumed the regulation of interstate telegraphic communication, the liability of the common carrier for mental suffering is also controlled by the Federal law (*Adams Exp. Co.* v. *Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Western Union Tel. Co.* v. *Brown*, 234 U. S. 542, 34 Sup. St. 955, 58 L. Ed. 1457); which law supersedes state regulations and decisions *ad hoc* (*Western Union Tel. Co.* v. *Compton*, 114 Ark. 193, 169 S. W. 946; *Western Union Tel. Co.* v. *Smith* (Tex Civ. App.), 188 S. W. 702; and the telegraph cases cited above).
>
> "The rights and liabilities of the parties depend, therefore, upon the terms of the contract entered into and *the common-law principles accepted and enforced by the Federal courts.*
>
> "(4) One of these principles is that damages for mental anguish only, claimed to be due to the carrier's default, are not recoverable."

It is the understanding of counsel that two cases involving these questions are now pending in this court and will shortly be reached for submission and argument:

> *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Company*, number 420, October term, 1918, and
> *Postal Telegraph-Cable Co.* v. *Dickerson*, number 671, October term, 1918.

We do not entertain any fear that the decision of this court will overturn the long and well considered line of authorities, Federal and State, which will be found in APPENDIX A.

Penalty statutes at all events superseded. As to those, there can be no possible doubt.

But, however clear it may be that State policies as to ELEMENTS OF DAMAGE and the validity of LIMITATIONS OF LIABILITY must yield in the face of the Federal enactment, there can be no possible question that State statutes imposing arbitrary *penalties*, without regard to actual loss, in connection with the transmission of interstate messages are no longer valid; and this whether the default occurred within or without the State.

The argument, such as it is, to sustain the State laws with regard to *actions for damages*, reduced to its simplest form, is this: although Congress has to some extent regulated the transmission of interstate messages, the Carmack Amendment does not apply to such messages and there is no specific and express regulation of the telegraph company's liability for damages; consequently the States are not excluded from that field.

This argument, if it has any force at all as to damages, has no application to penalties, because Congress has, by this Act, expressly penalized certain specific defaults in connection with the transmission of interstate messages, and thereby unmistakably expressed its intent that no defaults other than those specified shall be penalized.

An intentional preference or discrimination in interstate transmission is a violation of section 3. A wilful violation of any provision of the

act is under section 10 punishable by a fine not to exceed $5,000 for each offense. We therefore find that the situation under the act is this:

Congress has declared (1) that certain defaults, and those all of a *wilful* and *deliberate* character, shall be penalized; (2) that the punishment shall be a fine indefinite in amount, in the discretion of the court, not to exceed $5,000; and (3) that the recovery shall go to the United States.

On every settled constitutional principle it must be conceded that when the Congressional intent has been unequivocally expressed (1) to penalize certain specified wilful defaults (2) by a fine indefinite in amount and which (3) is payable to the United States, this must conclusively be deemed an expression of Congressional intent (1) *not* to penalize merely *negligent* acts, or wilful acts not of the character specified; (2) that the penalty shall *not* be fixed at a certain sum, differing in the different States and determined by the local law; and (3) that the recovery shall *not* go to a private informer.

With the exception of the judgment now under review, there has been no decision sustaining a state *penalty* statute as applied to an interstate message sent since the Act of 1910. The invalidity of such statutes, as applied to such messages, has been uniformly recognized by the State courts. The complete list will be found in APPENDIX C.

The pioneer decision, and probably the clearest, is *W. U. T. Co.* v. *Bilisoly*, 116 Virginia 562, from which we quote:

> "By an act of Congress approved June 18, 1910 (36 Stat. 539, c. 309), telegraph companies, so far as interstate business is concerned, have been placed under the direct supervision of the Interstate Commerce Commission, and are subject, so far as ap-

plicable, to the same rules, regulations, restrictions, and penalties that are imposed upon common carriers. This act has occupied the entire field and taken complete control of the regulation of telegraph companies, *and while it has impliedly exempted them from any penalty for negligence, it has provided a severe maximum penalty for intentional discrimination.* Before the passage of this act there had been no legislation by Congress affecting or conflicting with the state statutes imposing a penalty for failure to deliver messages promptly, and therefore the state statutes affecting telegraph companies were upheld, even as to interstate messages, upon the ground that until Congress had legislated upon the subject matter of telegraph companies, the state statutes were applicable. (*James Case*, 162 U. S. 650, 16 Sup. St. 934, 40 L. Ed. 1105; *Commercial Milling Co. Case*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088; *Croco Case*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498, and others.)

"In *Telegraph Co.* v. *White*, 113 Va. 421, 74 S. E. 174, this Court, in reviewing the cases on the subject, adopts the language of the Supreme Court, that where the state statute did not unfavorably affect or embarrass the telegraph company in the course of its employment, it would be held valid *until Congress spoke on the subject.* These decisions are based upon the fact that, at the time they were rendered, no Congressional legislation existed on the subject. *Such judicial utterances would mean nothing unless they meant that when Congress did act and undertake to regulate telegraph companies in*

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the matter of the transmission and delivery of interstate messages, the statutes of the state on the subject would be superseded by that action."

In the Leftridge case, not yet reported, the Supreme Court of Missouri, after referring to the Bilisoly case, the Gardner case and the decision of this court in *W. U. T. Co.* v. *Brown*, 234 U. S. 542, (the last named, incidentally, being somewhat misapprehended by the Missouri court, which has overlooked the fact that the message in that case was sent prior to the act of 1910,) concluded as follows:

> "These three cases together stand upon the theory that although the amendment of 1910 contains no provision directly controlling the action of the respondent with respect to the delivery of this message it was an exercise of the constitutional authority of Congress by which the company was placed under the control of the Interstate Commerce Commission with respect to its rates, rules and classification of its contracts, including the equality and fairness of its services and charges, that *by imposing certain penalties for violation of its duties in these respects it exercised its undoubted prerogative to control the conduct of this class of business by penal process,* and that having occupied this field of legislation the state was excluded. If Congress chose to let the rights and duties of the company rest upon the common law the state could not complain.
>
> "This is the foundation upon which these cases stand. *We think it is sound even without the authority of the Brown case,* which

controls us. The judgment of the Circuit Court for Macon County is reversed and the cause remanded with directions to enter judgment in accordance with these views."

If the delay of the message in this case had been due to a deliberate design of the telegraph company's employees to expedite other messages of the same class at the expense of Boegli's, or otherwise to discriminate against Boegli or his agent Parry, it would have subjected the company to the penal liability provided for in section ten of the Federal act, and it would not the less have been a violation of the statute of Indiana. Would there be a double liability in that event, once in the district court of the United States and once, in the State court, to the private informer? It is unthinkable; and if not, it can be for no other reason than that the State law is superseded by the law of the United States.

CONCLUSION.

The judgment of the Supreme Court of Indiana should be reversed.

Respectfully submitted,
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APPENDIX A.

DECISIONS APPLYING THE FEDERAL, AS DISTINGUISHED FROM THE LOCAL, RULE AS TO (1) THE VALIDITY OF THE **limitations of liability in the contract** FOR THE TRANSMISSION OF AN INTERSTATE TELEGRAM, AND (2) THE **measure of damages in an action based on the breach of such a contract, apart from limitations of liability:**

Gardner vs. W. U. Tel. Co., 231 Fed. 405. Petition for certiorari denied by United States Supreme Court, 243 U. S. 644.

Williams vs. W. U. Tel. Co., 203 Fed. 140.

W. U. Tel. Co. vs. Dant (District of Columbia), 42 App. Cas. 398.

W. U. Tel. Co. vs. Hawkins, 73 So. 973, —Ala.—.

W. U. Tel. Co. vs. Compton, 114 Ark. 193.

W. U. Tel. Co. vs. Johnston, 115 Ark. 564.

W. U. Tel. Co. vs. Simpson, 117 Ark. 156.

W. U. Tel. Co. vs. Holder, 117 Ark. 210.

W. U. Tel. Co. vs. Culpepper, 120 Ark. 319.

W. U. Tel. Co. vs. Petteway, 21 Ga. App. 729.

Bailey vs. W. U. Tel. Co., 97 Kas. 619; affirmed on rehearing, 99 Kas. 7.

Kirsch vs. Postal Tel.-Cable Co., 100 Kas. 250.

W. U. Tel. Co. vs. Lee, 174 Ky. 210.

Haskell Imp. Co. vs. Postal Tel-Cable Co., 114 Me. 277.

Dettis vs. W. U. Tel. Co. 170 N. W. 334,—Minn.—.

Poor Grain Com. Co. vs. W. U. Tel. Co., 196 Mo. App. 557.

Diffenderffer vs. W. U. Tel Co., 199 Mo. App. 48.

Jacobs vs. W. U. Tel. Co, 196 Mo. App. 300.

Kerns vs. W. U. Tel. Co., 198 S. W. 1132,—Mo. App.—.

Meadows vs. Postal Tel.-Cable Co., 173 N. C. 240.

Bateman vs. W. U. Tel. Co., 174 N. C. 97.

Norris vs. W. U. Tel. Co., 174 N. C. 92.

Askew vs. W. U. Tel. Co., 174 N. C. 261.
Johnson vs. W. U. Tel. Co., 175 N. C. 588.
Postal Tel-Cable Co. vs. Jones, 7 Ohio App. 90.
W. U. Tel. Co. vs. Bank of Spencer, 53 Okla. 398.
W. U. Tel. Co. vs. Orr, 158 Pac. 1139,—Okla.—.
W. U. Tel. Co. vs. Kaufman, 162 Pac. 708;—Okla.—.
Strause Gas Iron Co. vs. W. U. Tel. Co., 23 Phila. Dist. R. 291; affirmed, 59 Pa. Sup. Ct. 122.
Hall vs. W. U. Tel. Co., 108 S. C. 302.
Berg vs. W. U. Tel. Co., 96 S. E. 248,—S. C.—.
W. U. Tel. Co. vs. Schade, 137 Tenn. 214.
Boyce vs. W. U. Tel. Co., 119 Va. 14.
Williams & Sons vs. Postal Tel.-Cable Co., 95 S. E. 436,—Va.—.
Durre vs. W. U. Tel. Co., 165 Wis. 190.

APPENDIX B.

REPORT OF THE INTERSTATE COMMERCE COMMISSION IN THE UNREPEATED MESSAGE CASE (*Cultra* v. *Western Union Tel. Co.*, 44 I. C. C. 670):

Submitted April 12, 1917. Decided May 17, 1917.

1. Although certain of its provisions are inapplicable, the general principles of the act to regulate commerce, as amended, together with many of its details, extend to telephone and telegraph companies engaged in the transmission of interstate messages.

2. The defendant's repeated, unrepeated, and special value rates for the transmission of interstate messages, with the restricted liability attaching thereto, being expressly sanctioned by section 1 of the act to regulate commerce, are binding upon it as well as upon all others when such rates have been lawfully fixed and offered to the public, and may not be departed from until they have lawfully been changed.

3. The defendant's unrepeated rate and the restriction attached thereto not shown to be unreasonable, and the complaint dismissed.

HAL R. LEBRECHT and A. J. BOLINGER for complainants.

RUSH TAGGART, ALBERT T. BENEDICT and FRANCIS RAYMOND STARK for defendant.

HARLAN, *Commissioner*:

On March 21, 1914, Rodenberger & Company, commission merchants at San Francisco, deposited in the office of the defendant in that city a telegram properly addressed to the complainants at Clay Center, in the state of Kansas, advising them of the condition of the San Francisco market for poultry and kindred products. As the message reached the complainants at Clay Center, the part

in which we are interested here, through an error by the defendant, was made to read as follows: "Have sold car which you shipped." As accepted by the defendant at its San Francisco office for transmission that part of the message had read: "Haven't sold car which you shipped."

The conditions existing for some time at the San Francisco poultry market had led to a definite understanding between the complainants and their San Francisco brokers that the complainants would not make a further shipment until advised that the last preceding carload had been sold; with advice to that effect at hand, it was the understanding that the complainants might then let another carload go forward. In accordance with this understanding the complainants, upon receiving the message erroneously indicating that a previously shipped carload had been sold, permitted another carload then in transit to continue on its journey to the San Francisco market. On this shipment a loss of $1,790.83 was sustained, the direct result, as the complainants allege, of the defendant's error in transmitting the message.

To recover damages for the loss so incurred the complainants brought their action against the defendant in the circuit court of Jackson county, in the state of Missouri. The defense there interposed by the telegraph company was (*a*) that the court, by the terms of the contract under which the message was sent, was limited to an award of nominal damages only, even though the loss claimed was shown to have resulted from the defendant's negligence in forwarding the message; and (*b*) that the validity of the provisions in the contract restricting the defendant's liability to nominal damages was not within the competency of the state court to deny, but was a federal question which the Interstate Commerce Commission alone was

authorized by law to consider and deal with. In the light of that contention the trial court is holding the case in abeyance pending a ruling by this Commission. The questions presented for our consideration, as stated by the complainants, are in substance as follows: (*a*) Whether the Congress, by the act of June 18, 1910, amending the act to regulate commerce, has vested in this Commission such jurisdiction over the rates and practices of telegraph companies as to bring under our control and within our regulating power the rules of such companies concerning their liability for damages incurred by reason of error or delay in the transmission or delivery of interstate messages; and (*b*) whether, if the Commission has such jurisdiction, the present rules of the defendant telegraph company, with respect to these matters, are reasonable and, as the complainants put the inquiry, whether they are consistent with a sound public policy.

To enable us to dispose of these important contentions with a minimum expenditure of time and effort the facts in the case were agreed to by the parties and submitted upon stipulation. The questions involved are of first impression with this Commission, but before undertaking to discuss them there are one or two other agreed facts that should first be understood because of their direct bearing upon the controversy:

The message, in the transmission of which the error complained of was made by the defendant, was a so-called night letter telegram, upon which the complainants' brokers at San Francisco paid the charges regularly fixed and established by the defendant for an unrepeated night letter between the points in question. It was sent by the San Francisco brokers in answer to a telegraphic inquiry by the complainants and was offered to the defendant for transmission upon a telegraph blank bearing upon its face in clear, bold type this legend:

> Send the following night letter subject to the terms on the back hereof, which are hereby agreed to.

On the back of the blank it was again noted in equally bold type that all night messages were subject to the terms there set forth at length. This was followed by a clause providing for the application of the standard 10-word day rate to a night letter of 50 words or less. Then followed certain other provisions[1] which have always been interpreted by the defendant as limiting its liability, for such an error in the transmission of an unrepeated message as was made in this instance, to the nominal sum of $50 as a maximum, together with the return of the toll paid upon the message. That was its contention in the trial court, as before stated, and the same defense is made here. Apparently the complainants do not deny that this was the intended purpose and meaning of those provisions, or that the different charges for repeated and unrepeated messages, with the restricted liability attached to them, had long been in effect; but they contend as a matter of law that the restricted provisions have no validity or legal force. They assert that the defendant must therefore respond in damages in their action in the state courts without regard to those provisions and that the Commission has no jurisdiction in the premises. We are thus brought to a consideration of that question.

[1]The provisions, so far as they pertain to the matters in controversy, read, with capitals and italics as they appear on the blank form, as follows:

To guard against mistakes or delays, the sender of a night letter should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated night letter rate is charged in addition. Unless

otherwise indicated on its face, THIS IS AN UNREPEATED NIGHT LETTER AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the night letter and this Company as follows:

1. The Company shall not be liable for the mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED night letter, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED night letter, beyond fifty times the sum received for sending the same, *unless specially valued;* nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in obscure night letters.*

2. In any event the Company shall not be liable for damages for any mistakes or delay in the transmission or delivery, or for the non-delivery, of this night letter, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this night letter is hereby valued, unless a greater value is stated in writing hereon at the time the night letter is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

The act to regulate commerce was enacted on February 4, 1887, but it was not until the amendatory act of June 18, 1910, that telegraph and telephone companies were subjected to its provisions and declared to be common carriers within the meaning and purpose of the act. By that amendment jurisdiction over the rates and charges of such companies was conferred upon the Commission, accompanied by the declaration that all such rates and charges must be reasonable and that any unjust rate or charge is unlawful. But the legis-

lation by which these results were accomplished requires a somewhat careful examination. Section 15 of the act, as then amended, authorizes the Commission in express language to hear complaints respecting rates and charges "for the transmission of messages by telegraph and telephone" and to hear complaints respecting "classifications, regulations, or practices whatsoever" of any carrier subject to the act. Under these provisions the Commission has entertained and heard complaints against telegraph and telephone companies and has made findings and entered orders requiring the correction of unlawful discriminations and preferences and enforcing, in their charges and practices, the standard of reasonableness ordained in section 1 of the act. By appropriate language section 15 also provides that after the Commission has fixed the just and reasonable maximum rate or charge that may lawfully be exacted for the future by the carrier complained of, the latter shall not "demand or collect any rate or charge for such transmission in excess of the maximum rate or charge so prescribed"; it requires the carrier also to adopt, conform to, and observe, for the future, the regulations and practices prescribed by the Commission as just, fair, and reasonable. It will thus be seen that the control of the Commission, after full hearing upon complaint, over the rates, charges, and practices of telephone and telegraph companies is and has been regarded, by the Commission and by the parties before us in those cases, as being almost as complete and comprehensive as it is over the rates and practices of the several other classes of carriers that are subject to our jurisdiction. In other words, no embarrassment or difficulty has been found in applying the general provisions of the act, as well as many of its details, to common carriers serving the public in the transmission of

messages over telephone and telegraph lines between interstate points. Under section 20 we have also prescribed systems of accounts for interstate telegraph and telephone companies, which all such companies are now observing; under the provisions of that section they also file annual and other reports with this Commission.

But some of the provisions of the act, notably sections 2 and 4, that were neither modified nor amplified but were left unchanged by the amendatory legislation in question, have been found inapplicable in their present form to telephone and telegraph companies. Section 6 is also inapplicable, in large part at least. It deals with the form and manner of filing, publishing, and posting the rates, charges, rules, and regulations of common carriers; but on its face section 6 relates only to carriers engaged or participating "in the transportation of passengers or property." Its terms are too definite to permit us to extend their application by construction to telephone and telegraph companies; and, although the rates, charges, rules, and regulations of such companies may be stated more briefly perhaps, and with less expense, than the rates and regulations of any other class of carriers under our jurisdiction, we have not felt, as stated in our annual reports to the Congress for 1911 and subsequent years, that authority has been given to the Commission under section 6 to require such companies to comply with its provisions when fixing and establishing their rates and charges. The particular defendant here, the Western Union Telegraph Company, has nevertheless voluntarily filed with the Commission its tariff book containing the bases of its rates and charges, as well as its rules, regulations, blanks, and other matters relating to the service it undertakes to perform for the public; but, so far as the specific requirements of section 6 are concerned, the rates,

charges, rules, and regulations of telephone and telegraph companies may be and customarily are established and offered to the public without first being published and posted with the Commission, a procedure that must be observed by all other carriers under our jurisdiction before they may lawfully offer their services to the public or legally effect changes in their rates and practices.

Under the act, as has many times been said, the right to initiate their rates rests with the carriers. As section 6 does not apply to telephone and telegraph companies, it may well be said that in a special sense and to a special extent such companies do initiate their charges. But it has not been thought or even suggested that a telephone or telegraph company, after having fixed and established a charge for a particular service, or a regulation pertaining to or affecting the rate or service, may depart from the charge, or from the regulation affecting the charge, at its discretion or until the charge or regulation has been lawfully changed by it. The courts have often said that the vital feature of the act to regulate commerce is to secure equality and uniformity as to all persons availing themselves of the services of common carriers and to destroy any favoritism by such carriers among those requiring their services. This principle, founded in common right as well as in common justice, runs all through the act and through the supplementary legislation enacted in aid of the enforcement of the act. It can not therefore be doubted, and indeed the complainants here do not contend to the contrary, that even though section 6 is inapplicable to telephone and telegraph companies, their rates and charges are nevertheless binding upon such companies, when they have lawfully been fixed and offered to the public; and the rates and charges must be observed, together with

the rules and practices affecting the rates and charges, until they have lawfully been changed, either voluntarily or under the orders of this Commission. Having been declared to be common carriers, and having been subjected to the general provisions of the act, it is manifest that telephone and telegraph companies may not lawfully accept or exact of one person either less or more than they demand of another person for the same service. To secure such unifomity in their dealing with the public was doubtless one of the purposes of the Congress in subjecting telephone and telegraph companies to the provisions of the act to regulate commerce; and we think the language used by the Congress in doing this was sufficient to accomplish the end sought. It is scarcely necessary to add that there can be no uniformity in the application of the rates and charges of such companies unless rules and regulations like those here under consideration, that directly affect the rates, are also enforced without discrimination or preference.

Almost from the beginning of telegraphy in this country the basic rate has been that charged for the transmission of an unrepeated message, the rates for repeated and special value messages being built upon it. The unrepeated rate or charge has always been made upon the condition, stated in the contract between the sender and the company, that no liability should attach to the company for errors in transmission or delays in delivery beyond the sum received for sending the message. The higher rate for repeated messages, concurrently maintained for many years with the unrepeated rate, is predicated in part upon the additional service performed, and in part upon the liability of the defendant to make good any damages incurred, through error or delay in the transmission or delivery of the message, to the extent of fifty times the

rate charged, with a maximum of $50. For a long time also the defendant has maintained still higher charges under which, upon the payment of one-tenth of one per cent of the amount of the assurance desired, the defendant, within the value so placed upon the message, assumes liability to the full extent of the loss sustained. The fundamental difference between the unrepeated rate and the other two classes of rates is that under the former the sender assumes the risk of error or delay, while under the latter the carrier assumes the risk in part or entirely, as the case may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves.

The complainants contend that rates, and rules of this kind affecting the rates, that limit the liability of a telegraph company for error in transmission are unreasonable, because it is the duty of such a carrier, under the charges paid to it, to transmit all messages correctly. This theory assumes that the rate for an unrepeated message must necessarily embrace the obligation to transmit it correctly and to respond in damages for the failure to do so. On that point in *Primrose* v. *Western Union Telegraph Co.*, 154 U. S., 1, 25, it is said:

> "The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender and to require payment of the higher rate of half as much again if the company is to be

> liable for mistakes or delays in the transmission or delivery, or in the nondelivery of a message."

The complainants urge, however, that, unlike a shipment of goods or express matter, a telegraph message in itself has no intrinsic value, and that any value placed upon it by the sender before a loss results from an error in its transmission or delay in its delivery can not be other than an arbitrary value. There is undoubted force in that view. But, on the other hand, the sender may more nearly estimate the possible damage in the case of error in transmission or delay in delivery than can the telegraph company. The sender of a telegram occupies much the same position as the consignor of an express package. In neither case is the value of that which is offered for transmission or transportation known to the carrier. In the case of a telegram, if the carrier is to assume the same degree of risk that is assumed by the express company under similar circumstances, the rate demanded is the repeated message rate, under which the liability of the carrier is limited to the sum of $50, unless a greater value is declared. For a greater value an additional charge must be paid. The same limitation of value is observed in the form of express receipt prescribed in *Express Rates, Practices, Accounts, and Revenues*, 28 I. C. C., 131, 137, where it is said:

> "The classification prescribed provides for valuation charges upon articles of higher value. In the case of shipments of extraordinary value, not only is the carrier entitled to notice of such value in order that its care may be increased, but it is also entitled to extra compensation for the increased liability and care.

As before stated, the charge established by the defendant for the transmission of messages valued at more than $50 is one-tenth of 1 per cent of the excess value in addition to the repeated message rate. This special charge is the same as that found reasonable by us for a like liability in the transportation of express packages and is the usual insurance charge on shipments conveyed by parcel-carrying systems in other countries. *In re Express Rates, Practices, Accounts, and Revenues,* 24 I. C. C., 380, 397.

As has been said, the complainants cite many cases in which restrictions upon the liability of this defendant under its several classes of rates have been considered and the restrictions are variously referred to as unjust, unconscionable, without consideration, utterly void, or as being contrary to sound public policy. We are asked by the complainants to announce the latter principle in this case. On the other hand, the defendant cites an equal number of cases in which courts of great authority have upheld the restrictive rates. We shall not undertake to review any of these cases here. It will suffice to say that, apart from the federal legislation now under consideration, the complainant's action, if brought in some state courts would apparently meet with success, while if laid in the courts of other states would result in failure. This lack of uniformity among the courts, when dealing with the defendant's rates and the rules and regulations affecting its rates for the transmission of interstate messages, to some extent may explain the legislation by which the Congress has put all telephone and telegraph companies engaged in the interstate transmission of messages under our jurisdiction. But whatever may have occasioned the amendatory legislation, one of its necessary consequences, under the lan-

guage used, has been to put an end to this diversity in results; so that, as will be seen further along in this report, the charge as fixed and offered to the public by the defendant for transmitting an interstate message may no longer involve any greater or less liability in one forum than it does in another, but must be construed as attaching to the defendant's error the same degree of responsibility in all the courts.

The complainants, however, direct attention to the so-called Carmack amendment, which was a part of section 20 of the act to regulate commerce when the night message described of record was sent. That amendment, however, relates to the liability for loss, damage, or injury to property in transit caused "by any common carrier, railroad, or transportation company, to which such property may be delivered" for carriage, and is therefore another provision in the act that is inapplicable to telephone and telegraph companies. Largely on the omission there of any reference to carriers of this class, the complainants base their contention that the Commission is without jurisdiction to deal with the matters involved in this case but must leave them to the courts to adjust. The point they make is that as the Congress "has not seen fit to regulate the liabilities of telegraph companies to respond in damages for carelessly transmitting interstate messages * * * the law of the sovereign state is still in force"; and they ask the Commission so to declare in order that they may proceed with their action for damages in the state court. But the silence of the Carmack amendment with respect to telegraph companies and their liability for errors in the transmission of interstate telegraph messages can not be controlling with respect to our jurisdiction, if under other provisions of the act the matters in controversy here are brought within our cognizance. This we think is the case.

In extending the provisions of the act to telephone and telegraph companies, the Congress further amended section 1 by incorporating in it a clause reading as follows:

> "That messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

If, as a matter of law, as the complainants contend, the rate charged and collected for an unrepeated message carries with it the same protection to the sender or recipient and imposes upon the telegraph company the same liability and degree of care as the rate for a repeated message, then the express authority by the Congress to maintain classifications of repeated and unrepeated messages, with the different rates attached thereto, is without significance or effect; for no useful purpose would have been served in authorizing the two classifications taking different rates without recognizing the fundamental difference between them that for years has been well understood and maintained. It seems clear, therefore, that the Congress in recognizing, by the amendment to the act above quoted, these three classes of messages with the different charges attached, has also recognized a distinction in the defendant's liability under them, and has sanctioned this distinction for the future, subject of course to the general provisions in the act requiring all rates, and all rules and regulations affecting rates, to be reasonable and uniform in their application, under like circumstances, for the different kinds of service offered.

Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant, and upon all those who avail themselves of its services, until they have been lawfully changed. Abundant authority for this view is found in numerous decisions by the state and federal courts. In *Boyce* v. *Western Union Telegraph Co.*, 89 S. E. (Va.), 106, 108, it is said:

> * * * Congress, by the act of June 18, 1910, seems to recognize the necessity and validity of such stipulations and to authorize the making of such contracts with respect to repeated and unrepeated messages.
>
> * * * So that telegraph companies have here the direct authority and sanction of Congress to classify their messages into repeated and unrepeated and to charge different rates for each; in other words, to enter into the very contract which was made in this case.

See also, to the same effect, *Western Union Telegraph Co.* v. *Dant*, 42 App. D. C., 398; *Western Union Telegraph Co.* v. *Bank of Spencer*, 156 Pac. (Okla.), 1175, 1179; and *Haskell Implement & S. Co.* v. *Postal Telegraph-Cable Co.*, 96 Atl. (Me.), 219, 223. In the latter case it was held by the supreme judicial court of the state of Maine that, so far as interstate messages are concerned, the state courts have no jurisdiction over questions of classification and regulation, or respecting the reasonableness of rules and charges or the limitation of the carrier's liability, and that such cases must

be submitted for the determination of the

Interstate Commerce Commission, as in the case of other common carriers coming within the administrative competence of that Commission.

Our conclusion upon the record is that the Congress, by the language used in the amendatory act of 1910, has manifested a definite intention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions, and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeated rate to which was lawfully attached, as a fundamental feature of it, the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy but on the contrary are binding upon all until lawfully changed; and that neither the interstate rates of the defendant nor the rules, practices, conditions, and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful.

The complaint must therefore be dismissed, and it will be so ordered.

APPENDIX C.

DECISIONS RECOGNIZING THE INVALIDITY OF STATE PENALTY STATUTES AS APPLIED TO INTERSTATE MESSAGES:

W. U. Tel. Co. v. *Bassett,* 111 Miss. 468.
Davis v. *W. U. Tel. Co.,* 198 Mo. App. 692.
Taylor v. *W. U. Tel. Co.,* 199 Mo. App. 624.
Leftridge v. *W. U. Tel. Co.,*—Mo.—(March, 1919).
W. U. Tel. Co. v. *Bilisoly,* 116 Va. 562.
W. U. Tel. Co. v. *Bank of Berryville,* 116 Va. 1009.
W. U. Tel. Co. v. *Bolling,* 120 Va. 413.
W. U. Tel. Co. v. Mahone, 120 Va. 422.
W. U. Tel. Co. v. *Bowles,* —Va.—(March, 1919).

INDEX—Continued

TABLE OF CASES CITED

In the Supreme Court of the United States

THE WESTERN UNION TELEGRAPH CO.,
PLAINTIFF IN ERROR,
vs.
PETER BOEGLI,
DEFENDANT IN ERROR.

NO. 83,
OCTOBER TERM
1919

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT.

The statement of the facts involved in this case, as set forth in the Brief for Plaintiff in Error, is substantially correct. The case arose out of the negligence of the plaintiff in error in delaying the delivery of a message sent from Chicago, Illinois, to Fort Wayne, Indiana. There was no complaint as to partiality or discrimination involved, no question as to any rates, regulations or practices of the Telegraph Company, the sole complaint being as to the negligent act in the particular instance, which occurred within the territorial limits of the State of Indiana.

The Allen Circuit Court of Allen County, Indiana, assessed against the Telegraph Company, plaintiff in error herein, the penalty of $100.00 provided by the Indiana Statute (Sec. 5780-5781, Burns Rev. Stat. of Indiana, 1914) in such cases.

(Record, page 24.)

The case was then appealed to the Supreme Court of the State of Indiana, which affirmed the

judgment of the Circuit Court, and the present appeal was thereupon taken to this court.

W. U. Tel. Co. vs. *Boegli*—Ind., 115 N. E., 773 (Record pp. 40-48 inc.)

In the original proceedings, as well as in the appeal to the Indiana Supreme Court, the principal question, raised by the Telegraph Company and decided adversely to its contention by both courts, was that Congress, by the amendment of 1910 to the Interstate Commerce Act, bringing Telegraph Companies within certain of the provisions of said Act and subsequent amendments, had rendered inoperative the State Statute providing a penalty for the negligent delay in delivering, within the State of Indiana, of interstate telegrams.

The sole question presented for review by this court is, therefore, whether or not the Indiana Statute has been rendered inoperative as to the Interstate messages by the Congressional legislation referred to.

In support of the opinion of the Indiana Supreme Court, the defendant in error submits the following propositions and points of law and authorities.

PROPOSITION I.

Prior to the passage of the Act of 1910, approved June 18, 1910 (36 Stat. L. 539), the Indiana Statute was unquestionably valid, although applying to interstate messages.

Point 1. The Indiana Statute applies to interstate messages only where the act of negligence occurs within the State of Indiana, and in the entire absence of partiality or bad faith.

Western Union Tel. Co. vs. *Ferguson*, 157 Ind. 37.
Western Union Tel. Co. vs. *Braxton*, 165 Ind. 165.
Western Union Tel. Co. vs. *McClellan*, 38 Ind. App. 578.
Western Union Tel. Co. vs. *Sefrit*, 38 Ind. App. 565.

Point 2. The State, in the exercise of its police power, has the right to impose penalties upon telegraph companies for the failure to deliver messages promptly within the limits of the State, even where the messages are sent from another State. Statutes like the Indiana Statute are a valid exercise of the police power of the State and affect interstate commerce in only an incidental sense, being an aid to it rather than a burden or regulation upon it, and as such will remain in full force and effect until such time as Congress may pass an act on the same subject in direct and positive conflict with the act of the State.

Western Union Tel. Co. vs. *James* (1896), 162 U. S. 650—40 L. Ed. 1105.
Western Union Tel. Co. vs. *James*, 16 S. E. 83.
Western Union Tel. Co. vs. *Crovo* (1910), 220 U. S. 364—55 L. E. 498.
Western Union Tel. Co. vs. *Wilson* (1908), 213 U. S. 52—53 L. Ed. 693.
Western Union Tel. Co. vs. *Carter*, 156 Ind. 531.
Western Union Tel. Co. vs. *Gilkison*, 46 Ind. App. 29.
Western Union Tel. Co. vs. *Lark* (Ga. 1895), 23 S. E. 118.
Western Union Tel. Co. vs. *Howell* (Ga. 1894), 22 S. E. 286.

Western Union Tel. Co. vs. *Tyler* (Va. 1893) 18 S. E. 280.

Western Union Tel. Co. vs. *Hughes* (Va. 1905), 51 S. E. 225.

Western Union Tel. Co. vs. *Reynolds* (Va. 1902), 41 S. E. 856.

Western Union Tel. Co. vs. *Powell* (Va. 1897), 26 S. E. 828.

Western Union Tel. Co. vs. *Bright* (Va. 1894), 20 S. E. 146.

Western Union Tel Co. vs. *Mellon* (Tenn. 1896), 33 S. W. 725.

Western Union Tel. Co. vs. *Mellon* (Tenn. 1898), 45 S. W. 443.

Vermilya vs. *Postal Tel. & Cable Co.* (Mass. 1911), 91 N. E. 904, and 93 N. E. 635.

Connell vs. *W. U. Tel. Co.* (Mo. 1892), 18 S. W. 883.

Postal Tel. & Cable Co. vs. *Umstadter* (Va. 1905), 50 S. E. 259.

PROPOSITION II.

The Act of Congress of June 18, 1910, and its amendments, does not conflict with the Indiana statute in any sense; the acts of Congress do not touch in any way the subject of negligence in delivery of messages; both the Federal and State statutes may be given full force and effect, so far as negligence in delaying deliveries is concerned, without in any way interfering or conflicting with each other, and, therefore, the State statute remains in full force and effect as a valid exercise of the police power of the State.

Point 1. The States have surrendered to the United States the right to regulate interstate commerce, but the States have retained the right, known as the police power, to pass laws for the protection and convenience of their citizens, even

though such laws may incidentally affect interstate commerce. The United States, within its sphere, is sovereign, but each State, within its sphere, is equally sovereign. Therefore, a law enacted by Congress within its lawful power will not supersede an act of the State, enacted within its lawful power, unless the Act of Congress covers the precise and particular subject matter covered by the Act of the State. It does not invalidate the State statute merely because the two relate to the same general subject.

Pittsburgh etc. Co. vs. *State* (Ind. 1909), 172 Ind. 147. affirmed in 223 U. S. 713—56 L. Ed. 626.
P. C. C. & St. L. R. R. Co. vs. *State* (1913), 102 N. E. 25.
Savage vs. *Jones* (1911), 225 U. S. 501—56 L. Ed. 1182.

Point 2. Where the subject matter of a statute is not of such a national character as to require uniform regulation or legislation, applicable to all states alike, the power of Congress is not exclusive, and a statute of a State enacted in pursuance of its police power will be permitted to stand until Congress sees fit to enter the particular field and actually legislate upon the precise subject matter embraced by the terms of the State statute.

P. C. C. & St. L. R. R. Co. vs. *State* (Ind. 1913), 102 N. E. 25.
M. K. & T. R. R. Co. vs. *Haber*, 169 U. S. 613—42 L. Ed. 878.
P. R. R. Co. vs. *Hughes*, 191 U. S. 477—48 L. Ed. 268, affirming 202 Pa. 222—51 Atl. 990.
Reid vs. *Colorado*, 187 U. S. 137—47 L. Ed. 108.

A. C. L. R. R. Co. vs. *Mazursky*, 216 U. S. 122—54 L. Ed. 411.

Pittsburgh etc. Co. vs. *Hartford City*, 170 Ind. 674.

Lasater vs. *St. L. I. M. & S. R. R. Co.* (Mo. 1913), 160 S. W. 818.

P. R. R. Co. vs. *Ewing* (Pa. 1913), 88 Atl. 775.

Point 3. Inaction by Congress upon subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that, until it sees fit to legislate upon the precise subject matter embraced in the State statute, that subject matter may be regulated by State authority.

Pittsburgh etc. Co. vs. *State* (1908), 172 Ind. 147.

Pittsburgh etc. Co. vs. *State*, 223 U. S. 713—56 L. Ed. 626.

County of Mobile vs. *Kimball* (1880), 102 U. S. 691, at pg. 698—26 L. Ed. 238.

Chicago etc. R. R. Co. vs. *Solan* (1898), 169 U. S. 133—42 L. Ed. 688.

Varnville Furniture Co. etc. vs. *Charleston R. R. Co.* (S. C. 1918), 79 S. E. 700.

Point 4. If the law enacted by Congress within its lawful power touches the same subject as an act of the State within its lawful power, the courts will recognize the will of both bodies of lawmakers and both laws will prevail except in so far as they may be in direct and positive conflict.

(See authorities under Point 5 following.)

Point 5. "A statute enacted in execution of a reserved power of a State is not to be regarded as inconsistent with an act of Congress passed in execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

Savage vs. *Jones* (1911), 225 U. S. 501—56 L. Ed. 1182.

Standard Stock Food Co. vs. *Wright* (1911) 225 U. S. 540—56 L. Ed. 1197.

Asbell vs. *Kansas*, 209 U. S. 251—52 L. Ed. 778.

Crossman vs. *Lurman* (1903), 192 U. S. 189—48 L. Ed. 401.

Chicago, R. I. & P. Co. vs. *Arkansas* (1910), 219 U. S. 453—55 L. Ed. 290.

Point 6. The mere delegation to the Interstate Commerce Commission of power to pass regulations for the purpose mentioned in the act does not, of itself, supersede State statutes making regulations on the same subjects, and, until specific action by the commission or Congress, they will remain in full force.

Mo. Pac. R. R. Co. vs. *Laribee Flour Mills Co.* (1908) 211 U. S. 612—53 L. Ed. 352.

Point 7. The act of Congress of June 18, 1910, enlarged the scope of the original Interstate Commerce act, so as to bring telegraph and telephone companies within such of its provisions as are applicable to the business conducted by such companies and so far as the wording of the various

provisions of said act may apply. As so amended, the act provides that telephone and telegraph companies shall be considered to be common carriers within the meaning and purpose of the act; that all charges for transmission of messages shall be just and reasonable; that messages may be classified into day, night, repeated and unrepeated messages and such other classes as may be just and reasonable, and that different rates may be charged for the different classes of messages; that said companies shall not give any undue or unreasonable preference or advantage to anyone; that the Interstate Commerce Commission may, either on complaint or on its own initiative, inquire into any of the classifications, regulations, practices, rates or charges of said companies and condemn such as it deems unjust, and prescribe what shall be the just and reasonable classifications, practices, regulations, rates and charges to be followed by said companies. It also provides a heavy penalty for any company that "shall *willfully* do or cause to be done, or shall *willingly* suffer or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful * * * or shall *willfully* omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or *willingly* suffer or permit any act, matter or thing so directed or required by this act to be done, not to be done * * * or shall be guilty of any infraction of this act for which no penalty is otherwise provided."

But the act of NELIGENCE IN HANDLING MESSAGES OR IN THE DELIVERY OR TRANSMISSION OF SAME IS NOWHERE MADE UNLAWFUL, PENALIZED, OR EVEN REFERRED TO, and is evidently not in any way within the purview of the act.

Fed State Anno., Vol. 3, page 808 et seq.
Fed. State Anno., Supplement 1912, Vol. 1, page 111 et seq.
Fed. State Anno., Supplement 1909, page 254 et seq.

Point 8. The Federal statute, therefore, does not cover the precise subject matter of the State statute, and the two acts are not in any sense in conflict or repugnant to each other, but they may stand together and the provisions of both may be fully carried out without interference, and, therefore, the State statute has not been superseded by the act of Congress.

(Authorities cited supra.)

Point 9. The case of *Western Union Telegraph Company* vs. *Bilisoly*, 116 Va. 562—82 S. E. 91, as well as the other cases cited by plaintiff in error, so far as they hold that the mere placing of telegraph companies under the supervision of the Interstate Commerce Commission has deprived the States of power to enforce penalties for negligence in delivering messages, are in direct conflict, and, therefore, in effect overruled, by the United States Supreme Court in the case of *Mo. Pac. R. R. Co.* vs. *Larabee Flour Mills Co.*, 211 U. S. 612—53 L. Ed. 352; and, so far as they hold that the fact that the Interstate Commerce Act, by entering the general field of regulation of telegraph companies and providing penalties for intentional discrimination, although admittedly not touching the precise subject of negligence in delivery of messages, has superseded the State statute as to that subject, the cases relied upon by the plaintiff in error are in direct conflict to, and, therefore, in effect overruled by, the law as determined by the United States Supreme Court in the cases of:

Savage vs. *Jones*, 225 U. S. 501—56 L. Ed. 1182.

Standard Stock Food Company vs. *Wright*, 225 U. S. 540—56 L. Ed. 1197.

Asbell vs. *Kansas*, 209 U. S. 251—52 L. Ed. 778.

Crossman vs. *Lurman*, 192 U. S. 189—48 L. Ed. 401.

Chicago, R. I. & P. R. R. Co. vs. *Arkansas*, 219 U. S. 453—55 L. Ed. 290.

Pittsburgh, etc., Co. vs. *State*, 223 U. S. 713—56 L. Ed. 626.

Chicago etc. R. R. Co. vs. *Solan*, 169 U. S. 133—42 L. Ed. 688.

Reid vs. *Colorado*, 187 U. S. 137—47 L. Ed. 108.

Pa. R. R. Co. vs. *Hughes*, 191 U. S. 477—48 L. Ed. 268.

Mo. K. & T. R. R. Co. vs. *Haber*, 169 U. S. 613—42 L. Ed. 878.

The cases relied upon by the plaintiff in error are, therefore, based on a faulty principle of law, and are without weight in the determination of this question.

Point 10. Congress has not, by the amendment of June 18, 1910, to the Interstate Commerce Act, superseded State statutes providing a penalty against telegraph companies for negligence in delaying delivery of messages within the limits of the respective States.

Western Union Telegraph Company vs. *Boegli*—115 N. E. 773; Ind. (Record pp. 40-48 inc.)

And it has also been held in carefully reasoned cases that the amendments to the Interstate Com-

merce Act have not so occupied the field of regulation of telegraph companies as to render void the statutes of the various States providing that damages might be recovered for mental anguish caused by negligence in the delivery of telegrams and the statutes which make void the customary stipulations by which a telegraph company is accustomed to seek ostensibly to limit, but, in fact, to exempt itself from, its liability for negligence in the delivery of messages, but that such statutes still remain valid.

Western Union Tel Co. vs. *Bailey* (Tex. 1917), 108 Tex. 427—196 S. W. 516.

Bailey vs. *Western Union Tel. Co.* (Tex. 1914), 171 S. W. 839.

Bailey vs. *Western Union Tel. Co.* (Tex. 1916), 184 S. W. 519.

Western Union Tel. Co. vs. *Piper* (Tex. 1917), 191 S. W. 817.

Dickerson vs. *Western Union Tel. Co.* (Miss. 1917), 74 So. 779.

Warren-Godwin Lumber Co. vs. *Postal Telegraph & Cable Co.* (Miss. 1918), 77 So. 601.

Des Arc Oil Mill, inc., vs. *Western Union Telegraph Co.* (Ark. 1918), 201 S. W. 273.

Bowman & Bull Company vs. *Postal Telegraph & Cable Co.* (Ill. Sup. Ct. Oct. 27, 1919),—Ill.

Point 11. If the language of the Interstate Commerce Act permitting the classification of messages could be so construed as to require uniformity of liability to attach to messages in all the States, it would not apply to the statute in this case, for here the question is not one of obligation, under the contract, but of a penalty incurred by the telegraph company for the infrac-

tion of a public duty owed under a State statute, and certainly the words of the Interstate Commerce Act cannot be so stretched as to be held to apply in any way to the question of the liability of such companies for misdemeanors committed by them.

Point 12. Although the Interstate Commerce Act regulated railroads in considerable detail, it did not, prior to the Carmack amendment in 1906, render invalid State statutes either imposing penalties on certain defaults of the railroad or rendering void limitations contained in bills of lading seeking to limit their liability. And the Carmack amendment only had that effect because it specifically covered that exact subject.

Pa. Ry. Co. vs. *Hughes*, 191 U. S. 477—48 L. Ed. 268.
Atl. C. L. R. R. Co. vs. *Mazursky*, 216 U. S. 122—54 L. Ed. 411.
Adams Exp. Co. vs. *Croninger*, 226 U. S. 491—57 L. Ed. 491.
Kansas City R. R. Co. vs. *Carl*, 227 U. S. 639—57 L. Ed. 683.

But the Carmack amendment does not apply to telegraph companies.

W. U. Tel. Co. vs. *Bailey*, 108 Tex. 427—196 S. W. 516.

ARGUMENT.

That the Indiana statute, in the absence of Congressional action upon the same subject, is a valid exercise of the police power of the State, and as such, is not in conflict with the Commerce clause of the Constitution, has been settled by so unanimous a volume of authorities as to make it beyond any possible question. (See authorities under Proposition I, Point 2, supra.) For the purpose, however, of setting forth the reasons for the valid-

ity of this statute as applicable to the next question to be discussed, we quote from the case of *Western Union Telegraph Co.* vs. *James*, decided by the United States Supreme Court in 1896, as found in 162 U. S. 650—40 L. Ed. 1105.

In that case, a statute of the State of Georgia, similar to the statute of the State of Indiana, involved in the case at bar, imposing a penalty of $100.00 upon telegraph companies for negligence in delaying the delivery of a message, was in question. The company contended that, as the message had been sent from a city in Alabama to a city in Georgia, the message was interstate commerce and, therefore, the State statute could not apply. But the court held (and this case has since become a leading authority on the subject of the validity of State laws, enacted within their police power, when entering upon the field of interstate commerce) that the act was a valid exercise of the police power of the State and did not conflict with the commerce clause, and in doing so laid down the following principles: "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith, and with due diligence, is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for a violation of a duty which the company owed by the general law of the land is a regulation of, or an obstruction to, interstate commerce within the meaning of that clause in the Federal Constitution under discussion? We think not. No tax is laid upon an interstate message, nor is there

any regulation of a nature calculated to at all embarrass, obstruct or impede the company in the full and fair performance of its duty as an interstate sender of messages. We see no reason to fear any weakening of the protection of the constitutional provision as to commerce among the several States by holding that, in regard to such a message as the one in question, although it comes from a place without the State, it is yet under the jurisdiction of the State where it is to be delivered (after its arrival therein at the place of delivery) at least so far as legislation of the State tends to enforce the performance of the duty owed by the company under the general law. So long as Congress is silent upon the subject, we think it is within the power of the State government to enact legislation of the nature of this Georgia statute. It is not a case where the silence of Congress is equivalent to an express enactment. * * * While it is vitally important that commerce between the States should be unembarrassed by vexatious State regulations regarding it, yet on the other hand there are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the State upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the absence of any legislation by Congress, the statute is a valid exercise of the power of the State over the subject."

The principles, therefore, are well established that where legislation, such as the Indiana statute, is not unreasonable, is enacted within the police power of the State, and affects interstate commerce only incidentally, it will not be held to be invalid under the commerce clause of the Constitution, and will remain in full force until Congress passes a law on the same subject.

The plaintiff in error, however, claims that Congress has now passed such a law, and the question then arises as to how far Congress must enter upon the field covered by the State statute, and what sort of conflict between its provisions and those of the State statute there must be to have the effect of superseding the State statute, and whether, in this case, the Interstate Commerce Act and its subsequent amendments, so enters upon the subject of the State statute, and is so in conflict therewith, as to supersede the State statute so far as the question of liability for negligence in the delivery of interstate telegrams is concerned.

HOW DEFINITELY MUST AN ACT OF CONGRESS ENTER UPON THE SUBJECT OF A STATE STATUTE TO HAVE THE EFFECT OF SUPERSEDING THE STATE STATUTE?

In entering upon this subject there is one general and underlying principle that must be remembered to understand in their true light and meaning the principles laid down by the decisions to which we are about to call attention. These are:

1st. That the States have retained all power which was not expressly or impliedly surrendered to the Government of the United States.

2nd. That the States have surrendered to the United States their right to regulate interstate commerce.

3rd. That they have not surrendered, but retain, the power to pass laws for the protection of the health, the welfare, and the convenience of their citizens, even though such laws may incidentally affect interstate commerce.

4th. That although the United States is sovereign within its sphere, the State is equally sovereign within its sphere.

5th. That when the law of a State, enacted within its lawful power, conflicts even incidentally with a law of the United States, enacted within its lawful power, the law of the State must give way to the law of the United States.

These principles are unquestioned and are of broad general application, and from them the logical and common sense rule must be, and indeed, has been, derived, that where an act of a State is enacted within its lawful police power, and only incidentally affects interstate commerce, that law must be upheld until such time as Congress passes a law that not only touches upon the same general subject, but that covers the entire field of the particular subject of the State act; and does so in such a manner as that the provisions of the two acts conflict. So long as the enactments of the two sovereign powers may stand, each in its own sphere, although touching the same subject as the other, without interfering with one another, they will both be upheld. And in testing whether the two are inconsistent with one another, the courts will not hold the Congressional act to supersede the State act, "unless the repugnance or conflict is SO DIRECT AND POSITIVE THAT THE TWO ACTS CANNOT BE RECONCILED OR STAND TOGETHER."

This rule is logical and reasonable and in consonance with the spirit of our constitution, seeking to maintain the sovereignty of the States in its full vigor in so far as necessary to maintain the power of the United States so far as delegated to it by the States themselves in the constitution. The rule also, we believe, is not denied by any authority, and is sustained by a long line of decisions of the United States Supreme Court, and this, we believe, is the deciding rule in regard to the statute in question.

Thus in the case of *Savage* vs. *Jones*, 225 U S.

501—56 L. Ed. 1182, the validity of the Indiana Pure Food Act was in question. This act, among other provisions, required the vendors of foodstuffs to place a label on the package of goods showing, among other things, the ingredients of which the article was compounded. The Federal Pure Food Act required the placing of a label on each package, but only required that that disclose the percentage of certain injurious or dangerous articles contained in the compound. Thus the State statute covered the same ground as the Federal act, but, in addition thereto, it required more things. The United States Supreme Court held that the object of the one was to prevent false statements as to ingredients contained in the article; the objects of the other, to disclose the ingredients themselves. And the court, in deciding the question, speaking by Justice Hughes, made the following declaration of the principles that determined the case. As this case is directly in point, we quote at length from the opinion: "Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the State, with respect to the feeding stuffs coming from another State and sold in the original packages, the power the State otherwise would have to prevent imposition upon the public by making a reasonable and nondiscrimatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial, it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a State law enacted for these purposes. But it did not so declare. * * *

"Is, then, a denial to the State of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a State law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operations within its chosen field else must be frustrated and its provisions be refused their natural effect—the State law must yield to the regulation of Congress within the sphere of its delegated power. (Citing cases.)

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the State. This principle has had abundant illustration. (Citing cases.)"

After the above statements, the court quotes from the case of *Mo. K. & T. R. R. Co.* vs. *Haber*, 169 U. S. 613—42 L. Ed. 878, as follows: " 'May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserved power of a State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the constitution, *unless the repugnance or conflict is so direct and positive that the two cannot be reconciled or stand together.*' "

And again quotes from the case of *Reid* vs. *Colorado*, 187 U. S. 137—47 L. Ed. 108, as follows: "The court thus emphasized the general principle involved (supra, page 148): 'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police power of a state, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has often been reaffirmed—that in the application of this principle of supremacy of an act of Congress in a case where a State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'

" 'The act of Congress left the State free to cover that field by such regulations as it deemed appropriate, and which only incidentally affected the freedom of interstate commerce. Congress went no farther than to make it an offense against the United States, for anyone knowingly to take or send from one State or Territory to another State or Territory, or into the District of Columbia, or from the District into any State, live stock affected with infectious or communicable disease. The animal industry act did not make it an offense against the United States to send from one State into another live stock which the shipper did not know were diseased. The offense charged upon the defendant in the State court was not the introduction into Colorado of cattle which he knew to be diseased. * * *

" 'Our conclusion is that the statute of Colorado, as here involved, does not cover the same ground as the act of Congress, and therefore is not inconsistent with that act; and its constitutionality is not to be questioned unless it be in violation

of the Constitution of the United States independently of any legislation by Congress.' "

And in accordance with the above principles, the court, in the case of *Savage* vs. *Jones*, supra, holds that, although the two acts are on the same subject matter of labels requiring disclosure of ingredients of foodstuffs, yet, as they did not cover the exact subjects, and both could stand without interfering with each other, the act of Congress did not supersede the State act.

And so, in the case of *Southern R. R. Co.* vs. *Reid*, 222 U. S. 425—56 L. Ed. 257, the court, in holding that a State statute which required a railroad to accept shipments for other towns and to ship over the route designated by the shipper, "when tendered." under penalty for failure so to do, was in conflict with the Interstate Commerce Act which provided that no such shipment could be forwarded until after the railroad had published its rates. said "To what extent and how directly must it be exercised (*i. e.* the power of Congress) to have such effect? It was decided in the *Mo. Pac. R. R. Co.* vs. *Larabee Flour Mills Co.*, 211 U. S. 612—53 L. Ed. 352, that 'the mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, change the rule that Congress, by nonaction, leaves power in the States over merely incidental matters.' In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the commission, interfere with the authority of the State to make these regulations conducive to the welfare and convenience of its citizens. * * * Until specific action by Congress or the commission the control of the State over those incidental matters remains undisturbed.'

"The principle of that case, therefore, requires us to find specific action either by Congress in the Interstate Commerce Act or by the commission, covering the matters which the State of North Carolina attempts to regulate."

The court then goes on to hold that the provisions of the two acts cannot be carried out without conflict, and, saying that the situation is presented "if a carrier obey the State law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalty of the State law. Manifestly one authority must be paramount, and when it speaks the other must be silent."

So, in the case of *Pittsburgh etc. R. R. Co.* vs. *State*, 172 Ind. 147, which was afterward affirmed in *Pittsburgh etc. R. R. Co.* vs. *State*, 223 U. S. 713—56 L. Ed. 626, where the validity of the "Full Crew Act" was in question, the court says: "There are many cases, as the authorities affirm, where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty, within the limits of the State, upon the part of railroad companies, or other common carriers engaged in interstate commerce. This is especially true in respect to laws enacted by the State for the safety of persons and property. Such regulations are rather to be regarded as legislation in aid of commerce, and are generally considered with special favor by the courts. * * * The contention of appellant's counsel is by the passage of this statute the State has entered a class over which Congress has the exclusive power to legislate; therefore, they argue that the silence of Congress or the non-exercise of its power, alone prohibit the State from entering and legislating in respect to matters embraced within such clause. From the viewpoint of appellant's counsel, the claim in respect to the non-action of Congress is true, and a well settled proposition

(citing cases), but the fact is the statute involved does not legislate upon the subject over which Congress has exclusive power to legislate. The subject matter embraced in the statute is not of such a national character as to require uniform regulation of legislation, applicable alike to all States, so as to make the power of Congress thereover exclusive. But the act here in controversy is confined to the State in its operation, and may be permitted to stand until Congress sees fit to enter the field and actually legislate upon the PRECISE SUBJECT MATTER, in which event the statute in question would have to yield. It more properly belongs to a class in which the power of the State to legislate in respect thereto is concurrent with the Federal government, or, in other words, to a class into which either the State or the Federal government has the authority to enter and legislate upon the precise subject matter, but where the act of the State, in case of actual legislation by Congress, would be compelled to yield to such Federal legislation, in case of a direct conflict between the two acts.

"The non-action of Congress in respect to the legislation upon the precise subject matter of the statute in this case may be regarded as the equivalent of the declaration by that body, that, until it sees proper to legislate thereon, the matter may be regulated by the authority of the state." (Citing cases.) And quoting from the *County of Mobile* vs. *Kimball*, 102 U. S. 691—26 L. Ed. 238: "Inaction of Congress upon these matters of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority.' " And

the court concludes as follows: "There having been no actual legislation by Congress upon the precise subject matter covered by the act in question, therefore, until the happening of such an event, it must stand and control within this State, unless repealed."

At the time of the decision in the last case, the Interstate Commerce Act was in force and also a number of Federal laws requiring the cars of interstate trains to be equipped with automatic couplers, etc., but as there was no law specifically referring to the precise subject matter of the number of men to be carried on trains, the court holds that the two acts did not conflict and that therefore the State act remained valid.

So, in addition to the above cases, the above principles have often been reiterated.

In *Mo. Pac. R. R. Co.* vs. *Laribee Flour Mills Co.*, 211 U. S. 612—53 L. Ed. 352, although the defendant contended that "it was the intention of Congress to place every officer, employee, servant, and agent, as well as the business of every interstate carrier, including the tracks, cars, equipments and instrumentalities of every kind, nature and description under the exclusive control and supervision of the Interstate Commerce Commission," and that, therefore, the State had no power to compel the defendant to run certain tracks which affected interstate commerce, nevertheless the court held that as neither Congress nor the commission had specifically made any regulation as to the tracks in question, the State statute remained valid and in full force.

So, in *Pittsburgh etc. Co.* vs. *Railroad Commission*, 171 Ind. 189, the Indiana Supreme Court held that as Congress had not enacted any law which was inconsistent with the right of the State to order the defendant to put in an interchange track with another road, an order of the State

commission to that effect was valid, and in doing so the court says, quoting from *Ashbell* vs. *Kansas*, 209 U. S. 251: " 'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the State, even when it may do so, unless its purpose to effect that result is clearly manifested.' " So, in *Pittsburgh etc. Co.* vs. *Hartford City*, 170 Ind. 674, the Indiana Supreme Court upheld the city ordinance requiring lights at crossings, although affecting interstate commerce directly, and although the Interstate Commerce Act was then in full force.

So, in *Pittsburgh C. C. & St. L. Ry. Co.* vs. *State*, 102 N. E. 25, the Indiana Supreme Court held that the act making it an offense to use any caboose unless it was 24 feet long and had two four-wheeled trucks, the court held that in spite of the Interstate Commerce Act the statute remained valid, and said: "The acts of Congress and the Interstate Commerce Commission have not embraced the *specific* subject, either of handling of caboose cars or their wheel bases, and we regard the act of the State as not an interference with, or as placing a burden upon, or as regulating interstate commerce, even though the right of control extends to all the instruments of such commerce."

So, in *C. R. I. & P. Ry. Co.* vs. *Arkansas*, 219 U. S. 453—55 L. Ed. 290, the Supreme Court upheld the State law which required three brakemen on every train of 50 cars, although the Interstate Commerce Act was then in effect and also the act requiring automatic couplers, etc.

So, in *Laseter* vs. *St. L. I. M. & S. Ry. Co.* 160 S. W. 818, the Supreme Court of Missouri held in 1913 that as Congress had not entered upon the precise field of regulating the speed of mail trains, the State statute was valid.

So, in *Varnville* vs. *C. & W. C. Ry. Co.* (S. C. 1913), 79 S. E. 700, the court held that a State statute making the company liable to a penalty for its failure to settle a claim for damages done to a shipment within forty (40) days, is not superseded by that provision of the Interstate Commerce Act, that a common carrier shall be liable to a shipper for damage or loss of goods, for the reason that the two were not on the same precise subject matter and until specific action upon the particular subject of the State act by Congress, the State act remains valid.

In *C. B. & Q. Ry. Co.* vs. *Railroad Commission*, 140 N. W. 296, a State regulation requiring interstate trains to stop at certain local stations was held valid. Congress not having entered on that specific field.

So, in *Pa. R. R. Co.* vs. *Hughes*, 191 U. S. 477—48 L. Ed. 268, the court held that an act of the State providing that no common carrier could limit its liability for negligence, was not superseded by the Interstate Commerce Act, as that act did not provide anything regarding the limit of liability for negligence.

And in *Atlantic C. L. Ry. Co.* vs. *Mazursky*, 216 U. S. 122—54 L. Ed. 411, a statute was upheld as not conflicting with the Interstate Commerce Act that provided a penalty for the failure of a common carrier to pay claims within a certain period.

These decisions show beyond any question that until Congress has legislated upon the precise and entire subject matter covered by the State statute in such a manner as to conflict and interfere with the State statutes, the State statute will remain valid and in full force.

DOES THE INTERSTATE COMMERCE ACT CONFLICT WITH THE STATE STATUTE?

The question then that remains in this case is, does the Interstate Commerce Act, in any way,

touch upon the subject of liability of telegraph companies for negligence in the delivery of messages, and if it contains any provision touching on that subject, do the provisions of the Interstate Commerce Act so conflict and interfere with the provisions of the State act as that the two cannot be reconciled or consistently stand together? It must be evident from a careful reading of the Interstate Commerce Act with its amendments that there is no provision therein that deals in any way with the subject of negligence in the delivery of telegrams. That act was passed for the purpose of preventing discriminations and unjust preferences in interstate traffic, but no provision was placed in it regarding negligence or liability for negligence. The whole scheme of it is to prevent unlawful and intentional wrong on the part of carriers and to require them to make their rates and practices reasonable. The remedy sought to be administered was not that of holding the company liable for negligence of its servants, but rather for discriminations on the part of the company itself.

Heavy penalties are placed on carriers for intentional discriminations, but no penalty is provided for negligence. As the court said in the case of *W. U. Tel Co.* vs. *Billisoly*: *"That while it has impliedly exempted them from any penalty for negligence, it has provided a severe maximum penalty for intentional discriminations."*

The Indiana statute, therefore, falls exactly within the principle laid down in the case of *Savage* vs. *Jones*, and the others above set forth, viz.: that until we can find in the Interstate Commerce Act some clause that covers the precise subject matter of liability for negligence in delivery of messages and that not only touches upon that precise subject, but makes provisions of such a character as that the two cannot be reconciled or stand

together, the sovereignty of the State within its police power must be upheld and the Indiana statute held to be valid. The cases relied upon by plaintiff in error hold that because general powers of regulation have been conferred upon the Interstate Commerce Commission, and penalties have been imposed upon carriers for unlawful discriminations, that, therefore, Congress, by entering upon these fields, has impliedly exempted the carriers from any State regulations or penalties. This holding is squarely contradicted by the case of *Savage* vs. *Jones,* above, and the long list of other authorities which we have cited in this argument and under the points under Proposition II above.

We, therefore, submit to the court that the Indiana statute is a reasonable provision, and is a necessary and salutary regulation to protect the citizens of Indiana from the damage and loss that comes to them from the negligence of the servants of telegraph companies in delaying deliveries of messages; that there is no provision of the Interstate Commerce Act which gives the citizens of Indiana a remedy against a telegraph company whose servants negligently delay the delivery of telegrams, and that until Congress does pass some act which provides them with such a remedy, or which deals with this subject in such a way as to necessarily imply that it is the will of Congress that such acts be not punished, and until it passes some law that conflicts with the Indiana statute, and makes it impossible to enforce that act without interfering with the act of Congress, the State statute should be upheld as a valid exercise of the police power of the State.

The other cases cited by appellants hold either that:

First, State statutes making void stipulations contained in telegraph blanks seeking to limit the liability of the company for negligence in the

transmission or delivery of messages, are void, or

Second, that State statutes and decisions providing that damages may be recovered for mental anguish arising from negligence in the transmission or delivery of telegrams are void.

The courts rendering such decisions base their decisions in the first class of cases upon one or both of two grounds, namely, that Congress by the Act of 1910, has occupied the entire field of regulation of telegraph companies, and, therefore, that all State statutes seeking to regulate such companies have been superseded; or, the second ground, that Congress by providing that messages may be divided into classes and different rates may be charged for the different classes, has recognized the stipulations which telegraph companies were accustomed to attach to the different classes of messages existing at the time of the passage of the act.

As to the first ground of holding, we have already shown that there is nothing in the Interstate Commerce Act, as amended, which evinces an intention to occupy the entire field of regulation, and that the subject of negligence in the transmission of messages or delivery of the same is not in any way referred to; that State statutes may be fully carried out without conflicting in any way with the terms of the Interstate Commerce Act. The many cases we have cited hold that the Federal legislation must conflict with the act of the State in such a manner that both acts cannot be fully carried out without interference.

We are, therefore, firmly convinced that the first ground of holding as above set forth, is contrary to the established policy and former holdings of the United States Supreme Court, and, therefore, is not valid.

As to the second ground of holding above set forth, as notably relied upon in the case of *Cultra*

vs. *Western Union Telegraph Company*, 44 I. C. C. 670, which decision is quoted in its entirety in the brief of plaintiff in error, we believe that the commissioner rendering the opinion is mistaken as to the force of the meaning used by Congress in the Interstate Commerce Act. The commissioner says that no useful purpose would have been served in authorizing two classes of messages with different rates, unless different degrees of liability were attached thereto. But it seems to us that Congress may well have intended simply that one rate might be charged for a message sent in the daytime and another rate for a message sent at night to be delivered in the morning: that one rate might be charged for an unrepeated message, while the sender might be required to pay a higher rate for the additional certainty that would be obtained by having his message repeated: and that the different rates were authorized by Congress for the different services obtained in such different classes of messages based solely on the difference in the value of the service rendered and not at all on any question of liability which might attach because of negligence. It is notable that Congress has not provided in such amendment that different liabilities may be made to attach for the different classes of messages, but has merely provided that different rates may be charged for the different classes. Surely, if Congress intended that different liabilities should attach, it could easily have used appropriate language to have that result, whereas, it has, in fact, merely provided that different rates should attach. It seems to us that Congress should be held to have intended merely what it said, when it could so easily have used words to effect the result claimed for it by the cases cited by plaintiff in error.

It is also to be noted that the holdings in the cases cited by plaintiff in error would result in

giving to telegraph companies, who are not required to file their rates with the Interstate Commerce Commission, and whose rates will not come before that commission unless on complaint or action by the commission, the power to make laws respecting their own liabilitity for negligence by adopting various sorts of stipulations. Surely, this could not have been intended by Congress, as it would place the legislative power in the hands of telegraph companies. If such rates and restrictions should be called to the attention of the Commerce Commission and that commission should undertake to approve or modify or make any regulation regarding said stipulation as to liability for negligence contained in telegraph blanks, then the Interstate Commerce Commission would be exercising legislative power. And surely, as so ably set forth in the case of *Western Union Telegraph Company* vs. *Bailey*, 108 Texas, 427—196 S. W. 516, and *Des Arc Oil Mill, Inc.*, vs. *Western Union Telegraph Company*, 201 S. W. 273, Congress could have never intended to grant such legislative power to the telegraph companies or to the Interstate Commerce Commission merely by inference, but would have used appropriate and definite language to that effect.

At any rate, the above holdings would not be applicable to the question in the case at bar, inasmuch as, even if Congress intended that the liability to attach to negligence in the delivery of messages should be uniform throughout the States, the same would not be applicable to penalties imposed by States for the failure to perform the general duty owed to the citizens of the States to deliver telegrams within the States with due diligence. Such statutes do not create or affect the obligation or liability under the contract for transmission, but provide penalties for the commission of a misdemeanor, viz., the failure to per-

form a public duty, and the question of such misdemeanors is nowhere touched upon in the Interstate Commerce Act.

As to the holding that statutes providing for the recovery of damages for mental anguish are superseded, the decisions cited by plaintiff in error hold that such statutes have been superseded because Congress has occupied the entire field of regulation. This question has been fully discussed above, and, as shown, the holding is in direct conflict with the long line of cases decided by the United States Supreme Court requiring that the Act of Congress must not only enter upon the precise and particular field of the State statute, but must be in direct conflict therewith and so inconsistent therewith that the two cannot stand together. As we have shown, there is nothing in the Interstate Commerce Act or its amendments which touches upon the field of negligence in the delivery of messages, and the State statute and the Interstate Commerce Act may both be fully carried out without interference with one another.

Before the passage of the Carmack amendment in 1906, the Interstate Commerce Act, although regulating railroads in considerable detail, was held not to make void State statutes prohibiting railroads from contracting to limit their liability for negligence, because the Federal legislation did not touch that subject.

Pa. R. R. Co. vs. *Hughes*, 191 U. S. 477—48 L. Ed. 268.

Atl. C. L. Co. vs. *Mazursky*, 216 U. S. 122—54 L. Ed. 411.

Adams Express Company vs. *Croninger*, 226 U. S. 491.

Kansas City S. R. Co. vs. *Carl*, 227 U. S. 639.

The Carmack amendment invalidated such statutes only because it expressly covered that particular subject. But the Carmack amendment does not apply to telegraph companies.

W. U. Tel. Co. vs. *Bailey*, 108 Tex. 427—196 S. W. 516.

The conclusion seems irresistible, therefore, that telegraph companies stand in the same position under the Interstate Commerce Act as railroads did prior to the Carmack amendment, and that, therefore, under the above authorities, the subject of the negligence of telegraph companies is not covered by that act.

We therefore submit this case to the court with confidence that the decision of the Indiana Supreme Court is correct, and that it should be affirmed.

Respectfully submitted,

ARTHUR W. PARRY,

Attorney for Defendant in Error.

WESTERN UNION TELEGRAPH COMPANY *v.* BOEGLI.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 83. Submitted December 19, 1919.—Decided January 12, 1920.

An act of Congress regulating a subject of interstate commerce is not to be narrowly construed for the purpose of preserving the state power over the same subject previously enjoyed in the absence of federal legislation. P. 316.

The Act of June 18, 1910, c. 309, 36 Stat. 545, brought telegraph companies under the Act to Regulate Commerce and under the administrative control of the Interstate Commerce Commission, and so subjected such companies to a uniform national rule, incompatible with a power in the States to inflict penalties for failure to make prompt delivery of interstate messages. *Id. Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co., ante*, 27.

187 Indiana, 238, reversed.

THE case is stated in the opinion.

Mr. Rush Taggart and *Mr. Francis Raymond Stark* for plaintiff in error.

Mr. Arthur W. Parry for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The Telegraph Company challenged the right to subject it to a penalty fixed by a law of Indiana for failure to deliver promptly in that State a telegram sent there from a point in Illinois, on the ground that the Act of Congress of June 18, 1910, amending the Act to Regulate Commerce (36 Stat. 539, 545), had deprived the State of all power in the premises. The court conceding that if the act of Con-

gress dealt with the subject the state statute would be inoperative, imposed the penalty on the ground that the Act of 1910 did not extend to that field. The correctness of this conclusion is the one controversy with which the arguments are concerned.

The proposition that the Act of 1910 must be narrowly construed so as to preserve the reserved power of the State over the subject in hand, although it is admitted that that power is in its nature federal and may be exercised by the State only because of nonaction by Congress, is obviously too conflicting and unsound to require further notice. We therefore consider the statute in the light of its text and, if there be ambiguity, of its context, in order to give effect to the intent of Congress as manifested in its enactment.

As the result of doing so, we are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce as well as placing them under the administrative control of the Interstate Commerce Commission so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several States of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the court below erred therefore in imposing the penalty fixed by the state statute.

We do not pursue the subject further since the effect of the Act of 1910 in taking possession of the field was recently determined in exact accordance with the conclusion we have just stated. *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co.*, *ante*, 27. That case, indeed, was concerned only with the operation, after the passage of the Act of 1910, of a state statute rendering illegal a clause of a contract for sending an interstate telegram limiting the amount of recovery under the conditions stated in case of an unrepeated message; but the

315. Syllabus.

ruling that the effect of the Act of 1910 was to exclude the possibility thereafter of applying the state law was rested, not alone upon the special provisions of the Act of 1910 relating to unrepeated messages, but upon the necessary effect of the general provisions of that act bringing telegraph companies under the control of the Interstate Commerce Act. The contention as to the continuance of state power here made is therefore adversely foreclosed. Indeed, in the previous case the principal authorities here relied upon to sustain the continued right to exert state power after the passage of the Act of 1910 were disapproved and various decisions of state courts of last resort to the contrary, one or more dealing with the subject now in hand, were approvingly cited.

Reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed.